ENGLISH POLITICAL INSTITUTIONS

AN INTRODUCTORY STUDY

BY

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NOTE TO FOURTH EDITION

THE method adopted in 1924 for the revision of this work—and the reasons for it—are explained in the Preface to the Third Edition. The method appears to have approved itself to readers, and after a further interval of fourteen years, during which the book has continued to be in demand, I see no reason for changing it. Accordingly, *The Constitution in Transition I, 1910-1924* is now followed by *II, 1925-1938*. A few recent books have been added to the previous lists, and the Index has been revised, so as to include both the Preliminary Chapters.

J. A. R. MARRIOTT.

August 1923.

PREFACE TO THIRD EDITION

English Political Institutions was first published in 1910, and a second edition in 1912. Since that time it has been reissued four times but never revised. The time appears to have arrived when thorough revision can no longer be delayed; but it is not easy to decide what form such revision should take in the case of a book which has been for some time in general use as a text-book in Schools and Universities. My publishers and I are led to believe that the plan least likely to cause inconvenience to teachers is to leave the original text and pagination substantially unchanged, and to prefix to a new edition some introductory notes which will bring the book up to date and will indicate succinctly the main changes which have taken place in the structure and working of the English Constitution since 1910.

This I have done, but, for the convenience of those who possess earlier editions, the new Introduction will, for a limited period, be sold as a separate booklet. For those who do not, it may, I hope, serve as a useful summary of the most recent stage in the evolution of our ever-changing Constitution.

The first edition of this book enjoyed the incomparable advantage of a close revision at the hands of the late Sir William Anson. This new Introduction has enjoyed a similar advantage, having been revised by The Right Hon. H. A. L. Fisher, M.P., for many years my colleague at Oxford, and more recently my colleague in the House of Commons. To him and to Sir Henry Cowan, M.P., who has also been kind enough to read the Introduction in proof, I am grateful for several valuable suggestions which have led me to modify two of the more important paragraphs.

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PREFACE TO FIRST EDITION

• THIS book is intended as an introduction to the study of English Politics, but its scope is virtually limited to one section of the subject. It deals only with the structure of the State and the functions of the several organs of government. With abstract political philosophy it is not concerned, nor will there be found here any discussion of the conception or the functions of the State in general. My primary object has been to set forth the actual working of the English Constitution of to-day, and to do so with constant reference to the history of the past. I hope, therefore, that the book may be found to fulfil a twofold purpose: to provide an introduction to the history of English Institutions, and also to explain the contemporary working of the complicated constitutional machine.

The book is in fact based upon lectures which have already, I hope, fulfilled in some measure these purposes. Those lectures have been addressed, in forms varied to suit varying circumstances, to audiences of widely different types: to Oxford undergraduates entering upon their course of study for the Honour School of Modern History; to foreign teachers of many nationalities desirous to obtain a synoptic view of the working of English Institutions, and to working-men in several centres of Industry, in the hope of inducing them to undertake a more scientific study of 'Politics', in the strict sense of the term. Many of those who heard the lectures appeared to find in them something

which, in an equally compact and concentrated form, they could not find elsewhere.

It is this fact which has encouraged me to submit them to a wider and perhaps less indulgent audience. I claim for them no originality save that of form and presentation. There is scarcely a page which does not reveal my debt to the great historians, jurists, and publicists who have traversed parts of the same field: to Stubbs and Maitland, Freeman and Palgrave, Hallam and Erskine May, Maine and Tocqueville, Gneist and Boutmy, Hearn and Bagehot, Mr. Sidney Low and Mr. Bryce, President Lowell and President Woodrow Wilson, and above all to Sir William Anson and Professor Dicey. But heavy as is my debt to my teachers and predecessors, I know of no single book which exactly performs, or even attempts, the task which I have set before myself.

Long experience of teaching for the Oxford History School, supplemented by some knowledge of widely different audiences, has confirmed the suspicion which I entertained as an undergraduate that we begin the teaching of Constitutional History—the history of Institutions—at the wrong end. Most people, I fancy, are likely to interest themselves more in the *Civitas* and the *Vicus*, in Shire and Hundred, in Borough and Township, if they can first be interested in the revolution effected in Local Government by the legislation of 1835, 1888, and 1894; to discuss with avidity questions concerning the composition of the *Witenagemot* if they know something of the modern history of the House of Lords and the House of Commons; to appreciate the issues involved in the 'cases' of Darnel or

Hampden, if they understand the working of *tribunaux administratifs*—in a word, if they start not with the *Germania* and Stubbs and Dr. Liebermann, but with Mr. Sidney Low and President Lowell, with 'Hansard' and *The Times*.

It is part of the purpose of this little book to test the validity of this theory. I put it forth with unfeigned diffidence, but not without anxious consideration and prolonged experiment. Even should I fail to convince my professional brethren, I trust that I may succeed in opening a more seductive avenue to the study of English Institutions and in providing a more scientific basis for the study of English 'Politics'.

In the accomplishment of my task I have incurred many obligations which it is a pleasure to acknowledge. A list of published Authorities on which I have drawn freely will be found in an Appendix, and there are many specific references throughout the text. I am congenitally averse to repeating the same thing in a variety of ways. I have therefore borrowed a few paragraphs from a previous book and articles of my own. The latter were published in the *Nineteenth Century and After*, and for permission to reproduce them I am indebted to the kind permission of Mr. W. Wray Skilbeck. I have discussed the scope and arrangement of the book with the Rev. H. B. George, of New College, whose experience of the requirements of Secondary Schools is exceptionally wide. Sir Charles Roe, late Chief Judge of the Chief Court of the Punjab, has kindly allowed me to submit for his correction the sections dealing with Indian Administration both at Whitehall and in India.

To Sir William Anson, Warden of All Souls College and Senior Burgess for the University, I owe a debt which it is not easy to acknowledge in terms which shall be at once adequate to my own sense of obligation and not repugnant to him. In common with other students of English Institutions I owe much to his published works, particularly to that on the *Law and Custom of the Constitution*, but in addition I have been permitted to draw freely upon the accumulated stores of his erudition as a jurist and his experience as an administrator. He has not only read the whole of the book in proof, and favoured me with a large number of corrections and suggestions of the highest value, but has allowed me personally to discuss with him many subtle points of constitutional practice. If this book attains to any measure of exactitude, historical or political, it must be attributed, in large part, to the generous kindness of one who combines, in a unique degree, constitutional learning and experience of affairs.

The index I owe to hands to which I owe more than many indices.

To prevent misconception, it may be well to add that this book is not even an instalment of the 'larger work' foreshadowed in the preface to my recently published *Second Chambers*. It may, however, be regarded, and will, I hope, be accepted as a further preliminary study towards it.

OXFORD, *August* 1910.

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THE CONSTITUTION IN TRANSITION

I, 1910–24

En Angleterre la Constitution peut changer sans cesse ; ou plutôt elle n'existe point. To the first half of De Tocqueville's famous aphorism every publicist must needs assent. The English Constitution is a living organism subject to perpetual flux and the changes of tissue are so constant as to be almost imperceptible. This renders the task of the historian who attempts to delineate its features peculiarly difficult. This difficulty must explain, and will, I hope, excuse, the somewhat unusual form of this chapter. It has been written as an appendix or, more strictly, a revised introduction to this edition.

In adopting this course I follow the precedent set by Walter Bagehot when compelled to issue a second edition of his classical treatise on *The English Constitution.* Between the first (1867) and second (1872) editions of his book there had intervened Disraeli's Reform Act of 1867.

The changes which have taken place since 1910 are, however, more numerous and, in the aggregate, of even greater moment than those which occurred between 1867 and 1872. I am obliged, therefore, to treat them summarily and for convenience I consider them under heads suggested by the original chapters.

§ I. THE EXECUTIVE.

(i) THE CROWN.

The place of the Crown in the Constitution is discussed in Chapters III and IV ; but that discussion must now be supplemented by a brief reference to : (*a*) the Constitutional Crisis of 1910–11 ; (*b*) the significance of the Crown as a rallying-point for the nation and the Empire during the Great War; and (*c*) the increasing importance of the Crown as a 'golden link' between the several parts of the Oceanic Empire.

(*a*) *The Constitutional Crisis of* 1910–11

The rejection by the House of Lords of various measures—notably the Home Rule Bill of 1893—passed by the House of Commons on the initiative of Liberal Ministries, appeared to the Liberal Party to create a situation which could not be allowed to continue. In his last speech in Parliament (March 1, 1894) Mr. Gladstone declared that the controversy between the two Houses 'once raised must go forward to an issue'. When the Liberals, after a long exile, returned to power in 1906 that controversy was rapidly accentuated, and in 1907 Sir Henry Campbell-Bannerman, then Premier, moved a resolution 'that in order to give effect to the will of the people, as expressed by their elected representatives, it is necessary that the power of the other House to alter or reject Bills should be so restrained by law as to secure that, within the limits of a single Parliament, the final decision of the Commons shall prevail'.

Ignoring this threat, the Lords proceeded to wreck the legislative projects of the Government, and finally in 1909 rejected the Finance Bill of the year. Mr. Asquith, who had become Premier on the death of Sir H. Campbell-Bannerman (1908), promptly appealed to the electors, who returned Liberals and Conservatives in virtually equal numbers (274 and 272), thus making the Irish Nationalists (84 in number) masters of the situation. The Labour Party returned 41 strong. A bargain was quickly struck. The Nationalists would help the Liberals to curtail the veto of the Lords, provided the Liberals would then carry Home Rule for Ireland.

The King's Speech of 1910 foreshadowed proposals 'to secure the undivided authority of the House of Commons in finance and its predominance in legislation', and in April the Parliament Bill was introduced. It provided that if the Lords withheld for more than one month their assent to a Money Bill, it might be presented to the King, and on

his assent become law; that the Speaker should certify whether a Bill was or was not a Money Bill; that in reference to ordinary legislation the power of the House of Lords should henceforth be limited to a suspensive veto of two years, and that the term of Parliaments should be reduced from seven to five years.

Mr. Asquith intimated that if the Lords rejected the Bill the Government would resign or dissolve Parliament, and in the latter alternative would seek from the Crown a contingent guarantee that, if the electorate endorsed the policy of the Government, the King would create peers in sufficient numbers to give effect to it. This decision was communicated to King Edward, then taking a holiday at Biarritz. On May 6 the King died, and his successor, George V, found himself confronted at the very outset of his reign by a Constitutional crisis, more serious than any which had arisen since 1832, perhaps since 1688. Under the circumstances of the hour all parties were, however, naturally anxious to avoid recourse to extreme measures. A small conference, representing both parties and both Houses, was arranged in June, but after twenty meetings in which good progress towards a settlement was made, the conference finally broke down on November 10.

Two alternatives were then placed before the King: dissolution or the resignation of the Ministry; but it was plainly intimated to His Majesty that if he choose the latter 'he might place himself in the awkward position of bringing the Crown into a party controversy'. The King yielded 'with natural and . . . legitimate reluctance'.[1]

[1] The words were used by Lord Crewe (one of the two Ministers deputed by the Cabinet to lay their memorandum before the King) in the debate in the House of Lords, Aug. 8 and 9, 1911. This historic debate should be read in the Official Report. Cf. also *The Crown and the Crisis* in the *Fortnightly Review* for September 1911—an article which I wrote on first-hand information given to me (with permission to use it anonymously) by a statesman since dead.

Parliament was accordingly dissolved on November 18, but the election did not materially alter the situation. The Parliament Bill, framed on the lines indicated above, was introduced in February, was carried on second reading by 368 votes to 243 on March 2, and obtained a third reading on May 15.

Would the Peers submit or compel the Ministry to swamp the House of Lords by the creation of a batch of 500 radical Peers? A strong party led by Lord Halsbury, the veteran ex-Lord Chancellor, favoured the latter course, but more moderate counsels prevailed, and on August 10, amid scenes of intense excitement, the Lords passed the Bill. Its effect upon the position of the Legislature will be discussed later. I am concerned here with the reaction of the crisis upon the relations of the King and his servants, of the formal and the political Executive.

That a blow so damaging to the power and prestige of the hereditary branch of the Legislature could have been otherwise than distasteful to the hereditary monarch is unimaginable. That the King had been placed by the Cabinet 'in the most cruel position in which any Sovereign could be placed' was affirmed by Lord St. Aldwyn in the debate of August 9, and could not be denied. Even Lord Crewe, the Liberal leader of the House, described the business as 'odious'. But the King was compelled to yield, and by yielding registered the accomplishment of yet another stage in the long process by which power has been transferred from the Crown to a parliamentary Cabinet.

(*b*) *The Crown, the War, and the Empire.*

Nevertheless, on balance, the Crown has gained in political significance during the last fourteen years. This has been due partly, no doubt, to public appreciation of the extraordinary devotion with which the King and Queen and their children have fulfilled the functions, increasingly arduous,

imposed upon the Royal Family, but not less to the Great War and to the subtle changes which have taken place in the relations between Great Britain and the oversea Empire.

Of the personal devotion to duty of the present occupants of the Throne this is not the appropriate place to write, though it is not devoid of Constitutional significance. Nor is there need to dwell upon the opportunity afforded to the Crown by the Great War. The deep reality of the sentiment which on November 11, 1918, brought the surging multitudes, as though drawn by a common and irresistible impulse, to the gates of Buckingham Palace, cannot be missed by the least reflective commentator on contemporary events. From August 1914 to November 1918 the King was in an especial sense and to an extraordinary degree the embodiment of the spirit of the nation and of the Empire. If the hosts which went forth, not from Great Britain only but from every land where the British flag flies, were in truth embarking on a crusade for humanity, they also fought for King and Country. Nor did the King ever fail, during those anxious years, to rise to the height of a great opportunity, with the result that, despite the fact that in Central and Eastern Europe many thrones were overturned, the British Crown emerged from the ordeal established more firmly than ever as the symbol of national unity.

And not less as the symbol of Imperial unity. The effect of the War and the Peace upon the Constitutional relations of the Empire will engage attention later on. Its significance in relation to the Crown must be emphasized here.

(*c*) *The increasing importance of the Crown as a 'golden link'*.

The increasing importance of the Crown as the centre and symbol of Imperial unity was noted in the first edition of this book.[1] But the war did more than many years

[1] Cf. pp. 99, 100, *infra*.

of peace to intensify and solidify this sentiment. General Smuts, speaking in London in 1917, specially emphasized it. Belonging himself to the autonomist or nationalist school of colonial statesmen, he, nevertheless, recognized the supreme importance of the 'golden link' of the Crown.

'How', he pertinently asked, 'are you going to keep this Commonwealth of nations together? If there is to be this full development towards a more varied and richer life among our nations, how are you going to keep them together? It seems to me that there are two potent factors that you must rely upon for the future. The first is your hereditary Kingship, the other is our Conference system. I have seen some speculations recently in the newspapers about the position of the Kingship in this country, speculations by people who, I am sure, have not thought of the wider issues that are at stake. You cannot make a republic of the British Commonwealth of Nations.'

Arguing that the election of a President for the Empire would present an insoluble problem, General Smuts continued: 'The theory of the Constitution is that the King is not your King, but the King of all of us, ruling over every part of the whole Commonwealth of nations; and if his place should be taken by anybody else, that somebody will have to be elected under a process which it will pass the wit of man to devise.'[1] This is the language not of sentiment but of common sense. The abolition of the Monarchy would mean the dissolution of the Empire. It is arguable that in each component state of the Commonwealth an elected President might perform efficiently many of the functions now assigned to the Crown, but a President of the whole Commonwealth, still more of the vast and varied Empire, of which the Commonwealth forms only a part, is unimaginable.

In this connexion no small significance attaches to the repeated tours made by the Heir Apparent to the great Dominions, to India and to other portions of the Empire.

[1] *War Time Speeches*, p. 34.

The Prince of Wales has indeed proved himself to be a peculiarly efficient 'ambassador of Empire', acquiring knowledge, at first hand, of the problems which await solution in the several parts of the King's dominions, and making the personal acquaintance of many thousands of his father's subjects.

Thus if there has been, even during the period covered by these notes, some further contraction in the influence of the Crown upon domestic politics, the contraction in one sphere has been more than compensated by expansion in another and a wider sphere.

(ii) THE CABINET.

Of the peculiar type of Democracy which it is the pride of the English people to have evolved the central and cardinal feature is the Cabinet. From 1714 to 1914 the Cabinet system developed steadily and virtually without interruption. The outbreak of war proved that there were limitations to its utility. Or did the war merely expose a weakness inherent in the mechanism? Was Cabinet government already obsolescent? Experienced administrators have not hesitated to answer that question in the affirmative. 'I do not think anybody will deny that the old Cabinet system had irretrievably broken down both as a war machine and as a peace machine.' So spake Lord Curzon of Kedleston in June 1918.[1] The Haldane Committee on the Machinery of Government reported (also in 1918) that 'a rearrangement of the supreme direction of the executive organization as it formerly existed has been rendered necessary, not merely by the war itself but by the prospect after the war'.[2]

The old Cabinet system subsisted until December 1916,

[1] Cf. debate in House of Lords, June 19, 1918, when Lord Lansdowne and others spoke to similar effect.

[2] Cd. 9230 (1918), p. 5.

but Mr. Lloyd George, on his accession to the premiership, initiated a striking constitutional innovation. 'You cannot', as the new Premier bluntly said, 'wage war with a Sanhedrim.' Consequently, the old Cabinet, even if it can be held to have survived, was afforced by a War Cabinet or Directory, consisting at first of five and later of six members. Of these one only, the Chancellor of the Exchequer, was head of a Department or closely connected with the House of Commons. The rest of the Directory, including the Prime Minister, were intended to be free to devote themselves, uninterrupted by Departmental or Parliamentary business, to the conduct of the war.

The War Cabinet met almost daily—300 times during the year 1917—and received at every meeting reports from the Foreign Secretary, the First Sea Lord of the Admiralty, and the Chief of the Imperial General Staff. The heads of Departments attended only when the affairs of their several Departments were under discussion. The administration of domestic affairs thus became virtually departmental, although among the Ministers outside the War Cabinet some sense of collective responsibility was maintained by periodical meetings and by a weekly breakfast at 10 Downing Street. But the clash of arms is apt not only to silence laws, but to set aside many constitutional conventions; above all it led to the rapid multiplication of ministries and therefore ministers, and the line between Cabinet and non-Cabinet Ministers was not, in fact, rigidly defined.

The War Cabinet system did not long survive the conclusion of Peace. The Haldane Report contemplated that the Cabinet of the future should approximate to that of the War Cabinet; that it should consist of ten or twelve members who were not, as a rule, to act as Heads of Departments, but to exercise functions supervisory and co-ordinating rather than directly administrative. But the Peace was hardly signed before Parliament began to mani-

fest some curiosity, if not impatience, as to the prolongation of the war-time experiment, and in October 1919 it was quietly announced that a Cabinet of twenty members of the pre-war type had been appointed. Subsequent Cabinets have not deviated from the old pattern.

Two other constitutional innovations, due to the initiative of Mr. Lloyd George, deserve notice.

One was the creation of a Cabinet Secretariat. This was a development of the Committee of Imperial Defence and was plainly necessitated by the war. Nor must it be confused with the personal Secretariat of the Prime Minister, which, located in the garden of 10 Downing Street, was colloquially known as the *Kindergarten* or the 'Garden suburb'. In 1913 the personal Secretariat of the Prime Minister amounted to only four persons, and the cost to the Exchequer was at the rate of £1,017 a year. So rapidly did it grow that in the first quarter of 1922 the staff numbered twenty, and was remunerated at the rate of £9,318 a year.

Quite distinct from this is the Cabinet Secretariat, which has its offices in Whitehall Gardens. Including the Committee of Imperial Defence, with which it constitutes for staff purposes a single unit, the total staff numbered, in 1918, 98 and the cost of it was £19,600. By 1922 the staff had unaccountably swollen to 137, and the cost still more unaccountably to £36,800. These facts evoked strong comment in Parliament, and the staff has now (1924) been reduced to 38, costing £15,500 a year. The Secretariat itself must, however, now be regarded as a permanent part of the constitutional machinery. Its precise character and functions are nevertheless somewhat obscure. Its critics represent it as a new Department thrust in between the Cabinet and the administrative Departments, and in particular between the Cabinet and the Foreign Office, an appropriate adjunct of a new system of 'presidential' as opposed to 'Cabinet' government. Its apologists

deride these fears and maintain that its functions are merely secretarial, that it only records the transactions of the Cabinet and transmits its decisions to the appropriate Departments. For so modest a function the machinery would seem to be somewhat costly and elaborate. But, modest or ambitious, the Secretariat has evidently come to stay.

Much more important was the second of the two experiments. Almost the first act of the Lloyd-George Government which came into power in December 1916 was to call into council the leading statesmen of the Dominions and representatives of India. In this Imperial War Cabinet the statesmen of the Homeland and the Dominions sat side by side, on terms of perfect equality. Collectively they were responsible for the conduct of the war. Fourteen meetings of the Imperial Cabinet were held in the spring of 1917, with results so satisfactory that it was resolved that the meetings should be repeated annually, in the hope that an Imperial Cabinet would 'become an accepted convention of the British Constitution'.[1]

A second session of the Imperial War Cabinet, similarly constituted, was held during the summer of 1918; a third opened after the conclusion of the Armistice (November 20), and during the sittings of the Peace Conference in Paris this Cabinet was virtually continued in the British Empire Delegation which sat until June 10, 1919.

Meanwhile in August 1918 an official announcement had been issued that 'it has been decided that the Dominions shall be represented each by a Minister permanently stationed in London, and that the Imperial War Cabinet shall meet from time to time with these Ministers as members of it'.[2]

This project has never materialized, and when the Im-

[1] Cf. Mr. Lloyd George's statement to the House of Commons (May 17, 1917).

[2] Cf. *Report of War Cabinet for 1918*, especially pp. 7–10.

perial Conference met in 1921 was virtually if not formally abandoned.[1] The issue of an experiment which seemed, during the later years of the war, to promise the evolution of a real Imperial Executive has undoubtedly disappointed many hopes. But a rapid evolution of political machinery would not conform to British traditions. The general effect of this period upon Imperial relations will be discussed later.

(iii) The Administrative Departments.

In no sphere of governmental activity have the changes, since 1910, been more important than in that which concerns the work of the administrative Departments. The account given in Chapter V must needs, therefore, be supplemented.

To the increase of the work of 'Whitehall' three factors have in particular contributed: (i) the pressure of 'social reform' and the consequent enactment of schemes for Health and Unemployment Insurance, the setting up of Labour Exchanges, and the provision of Old Age Pensions; (ii) the demands made upon national resources by a great war; and (iii) the restoration of normal conditions of social and industrial life after a period of unprecedented upheaval. The result has been an immense addition to the work of the old Departments, and the creation of several new ones. The change is strikingly illustrated by the expansion of expenditure on the Civil Services. In 1913–14 that expenditure (deducting the expenses of the Post Office) amounted to £57,124,515; in 1923–4 (after a similar deduction) to £256,341,352, having in the meantime (1917–18) gone over £850,000,000. Many of the new Ministries, Committees, and Departments set up during the war—such as the Ministries of Munitions, of Shipping, of Food, of National Service, of Information, of Blockade,

[1] Cf. *Summary of Proceedings and Documents*, p. 21.

of Reconstruction—have already disappeared. Several, on the contrary, have not; among these the new Ministries of Labour, of Pensions, and of Transport, and the new Departments of Mines and Overseas Trade which are attached to one, or more, of the older Departments. The fact that the Estimates (for 1921–2) of the newly constituted Ministry of Labour reached a total of over £22,000,000, and those of the Ministry of Health (formerly the Local Government Board) no less than £24,245,098 (for the same year), affords eloquent testimony to the varied activities of a new Department and the rapid expansion of an old one.[1] The Ministry of Pensions was in the same year responsible for an estimate of no less than 111½ millions; but that represents a war liability which will in time be liquidated, and is less indicative of the permanent enlargement of the sphere of government, and the growth of bureaucracy, than the expenditure of the Ministries of Labour and of Health. How far this development is sound is a question rather for the political philosopher than the mere constitutional historian and cannot, in this place, be pursued.

§ II. THE LEGISLATURE AND THE ELECTORATE.

The passing of the Parliament Act (1911) and of the Representation of the People Act (1918) has effected changes so important as to demand a substantial supplement to Chapters VII and XI.

To the terms of the Parliament Act reference has already been made in a previous section. It remains, however, to note that by its enactment a formal change of the first magnitude has been made in the relations between the two Houses of the Legislature and in the relation of Parliament as a whole to the electorate.

[1] The estimates of the Local Government Board for 1913–14 were £4,206,913.

Down to 1911 the two Houses were technically co-ordinate in authority. The Parliament Act finally dissipated that fiction. It deprived the House of Lords of all control over Money Bills, and in this important sphere made the House of Commons supreme. Over general legislation the House of Lords does indeed retain the right of suspensive veto for a period of two years, but subject to this limited veto the Parliament Act made the House of Commons omnipotent. The House of Lords also retains the important right to initiate legislation, and individual peers are entitled to interrogate Ministers—or such of them as sit in the Upper House—and can secure a debate upon any subject in which they are interested. Debate is indeed the one substantial function left to the Peers, and they still exercise it, by general admission, with excellent effect. The Lords' debates on matters of high policy afford nothing short of a liberal education.

Yet no student of political institutions can regard the present condition of the Legislative Body in England without grave concern. The world has decided with rare unanimity in favour of the bicameral form of legislature. Experiments in unicameralism have been few and unimportant, and have invariably served to demonstrate the necessity of a Second Chamber. Nor did the Parliament Act itself question this elementary truth. On the contrary, the preamble formally announced the intention to 'substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis'. Yet no step was taken by the Government responsible for the Parliament Act to implement that pledge; nor, it must be added, by any subsequent Ministry. The only practical approach to a solution of the grave constitutional problem was made by Mr. Lloyd George, who in 1917 appointed a Joint Committee drawn in equal proportions from the two Houses and comprising represen-

tatives of all parties. The Committee was instructed to inquire and report as to the constitution and powers of a reformed Second Chamber, and as to the best mode of adjusting differences between the two Houses of Parliament. It sat, under the chairmanship of the veteran jurist Lord Bryce, for more than six months and held nearly fifty prolonged sittings. It recommended a drastic reduction in the numbers of the Second Chamber, which was in future to consist of 350–400 members. Peers of the Blood Royal and the Law Lords were to remain as at present. The rest of the Chamber was to consist of two sections: (i) about 273 members elected by panels of members of the House of Commons distributed in fifteen geographical groups; (ii) not more than ninety-one members chosen by a Joint Committee of both Houses. The latter were in the first instance to be selected from the Peers, hereditary or spiritual; ultimately the choice was to be unrestricted, provided that the number of Peers never fell below thirty. The Second Chamber was to have no power over Money Bills, but otherwise was to have co-ordinate legislative authority.

Differences between the two Houses were to be adjusted by the method of 'Free Conference'—the Conference to consist of a Joint Standing Commitee of forty members appointed, for each session, in equal proportions by the Committee of Selection in each House, with the addition of ten members from each House appointed *ad hoc* in respect of each Bill in dispute.

The scheme formulated by the Bryce Committee was stillborn. It was inferior to the French Senate as regards simplicity and symmetry, and it lacked the boldness of conception which characterized the work of Hamilton and his colleagues in devising a Senate for the United States. But it is more difficult to rebuild on old foundations than on a new site, and even more difficult to devise a satisfactory

Second Chamber in a unitary as compared with a federal State. In a federal State the materials are ready to hand, and a differentiation between the two Houses is provided by nature. Intelligibility and differentiation are of the essence of the Second Chamber problem. Few, save those who have had to face that problem practically, can be aware of the difficulty of securing these attributes in a manufactured Senate. The hereditary principle supplies both; so does the Federal principle. But we are not yet in a position to apply the latter, and the former is condemned as untenable. We are, therefore, left, in the absence of a reconstructed Second Chamber, with the *torso* of a Legislature.

Nor have the years since 1910 left the House of Commons unaffected. The Act of 1911 reduced the maximum duration of Parliament to five years, though the Parliament which enacted it manifested its legislative omnipotence by prolonging its own existence for three years beyond the legal term. The Reform Act of 1918 has revolutionized the basis on which it rests. The Bill was introduced as virtually an 'agreed' measure, being based upon the report of a Conference of about thirty members of both Houses, representative of the various shades of opinion in Parliament and in the country, and presided over by Mr. Lowther (now Viscount Ullswater), then Speaker of the House of Commons. The scope and magnitude of this new Reform Bill can best be appreciated by comparing its provisions with those of the Bills enacted in 1832, 1867, 1884, and 1885 (cf. *infra*, pp. 222–5). It dealt comprehensively with the qualifications and registration of electors, with the method and costs of elections, and with the distribution of seats.

The qualification of electors was greatly simplified. The property qualification was abolished and no person could henceforth vote in more than two constituencies: (*a*) on a residential qualification; (*b*) for business premises or for

a University. In addition to certain temporary provisions for soldiers and sailors who were serving or had served in the war, and for the disqualification of conscientious objectors, the Act provided that all men of twenty-one years of age who were qualified by six months' residence or by the occupation of business premises, and all women of thirty years of age who were local government electors or wives of such electors, should have a Parliamentary vote. Registers of voters were to be prepared twice instead of once a year, and the Exchequer and the Local Rates were to share the expenses of registration. Returning officers' expenses were to be paid by the Treasury, and the maximum scale of other election expenses was strictly limited.

Great changes were made in the distribution of seats, involving the extinction of forty-four old boroughs, and the creation of thirty-one new boroughs, including no fewer than thirteen in greater London. Representation was given to the new Universities, arranged in groups, thus bringing up the total of University representatives from nine to fifteen. Otherwise the principle of single member constituencies of approximately equal size was as far as possible preserved; one member being assigned approximately to every 70,000 inhabitants. Including 105 Irish members, the total membership of the House was increased from 670 to 707. This last provision never, as a fact, became operative. The refusal of the Irish Sinn Feiners to sit in the Imperial Parliament, the curtailment of Ulster's representation, and the creation of the Irish Free State again reduced the numbers to 615.

In comparison with this Act previous Reform Acts almost sink into insignificance. The Act of 1832 added about 450,000 electors to the register. That of 1918 added nearly 13,000,000, of whom 9,000,000 were women. The total electorate, even excluding southern Ireland, was thus increased to about 21,000,000.

The effect of so wide an extension of the suffrage, to say nothing of the enfranchisement of women, cannot yet be measured; nor is it possible to predict whether this enlargement of the basis of Parliamentary representation will suffice to counteract the effect of certain tendencies which seem to threaten the prestige, if not the existence, of the Parliamentary type of democracy.

Parliamentary government, as worked out in England, rests on a nice equipoise between the Legislative and Executive Power, vesting ultimate control in the former, but permitting a wide discretion to the latter. The war inevitably disturbed the balance. Power was necessarily confided not merely to the Executive but to the individual head of the Government, whose position ceased to be that of a mere First Minister surrounded by colleagues, and approximated to that of a President. Cabinet government has been restored, and the Premier has lost something of his Dictatorial authority, yet it remains to be seen whether the Premiers of the future will occupy quite the same place in relation to their Cabinet colleagues as they did before the war. Much will, of course, depend, as it has depended in the past, on personalities. Two or three weak Premiers would soon redress the balance. Nor is it yet certain whether the Cabinet has permanently gained at the expense of Parliament. Should the tendency of parties to break into groups be accentuated, should the three-party system be stereotyped, the Executive might be weakened and the Legislature might regain much of its power.

A larger question looms on the horizon. Parliament is now exposed to serious competition. Based upon the principle of the representation of localities, the House of Commons is, in the opinion of some, no longer adequate to the discharge of the varied duties which are necessarily thrust upon it by a highly industrialized society. Parliament, writes one of the younger school of publicists,

'is chosen to deal with everything that may turn up, quite irrespective of the fact that the different things that do turn up require different types of persons to deal with them. . . . Real democracy is to be found not in a single omnicompetent representative assembly, but in a system of co-ordinated functional representative bodies'.[1]

The question is too large to be pursued in this place; but the student of Politics will do well to take note of the tendencies which are menacing the hitherto undivided and unchallenged supremacy of Parliament.[2]

Menaced by the multiplication of external organizations, Parliament has itself not merely connived at, but contributed to the infringement of its legislative monopoly. In former days Englishmen were said to be distinguished from their continental neighbours by their 'instinctive scepticism about bureaucratic wisdom'. Consequently Parliament attempted, in making laws, to provide beforehand, by precise statutory enactment, for every contingency which might reasonably be expected to arise. This naturally rendered the form of English statutes exceptionally elaborate and detailed. Parliament has recently shown a marked tendency to abandon this tradition. In our legislative forms we have moved towards continental methods. Partly owing to the increasing complexity of industrial and social conditions, partly under the subtle influence of Fabian Socialism, partly from the general abandonment of the principle of *laissez-faire* and the growing demand for governmental guidance and control in all the affairs of life, partly from sheer despair of the possibility of coping with the insistent cry for legislation, Parliament has manifested a disposition to leave more and more discretion to the administrative department. Many

[1] G. D. H. Cole, *Social Theory*, p. 207.

[2] For further discussion of the questions raised in this and the preceding section reference may be made to articles by the present writer in the *Fortnightly Review* for February 1920 (*Quo Vadis*); October 1920 (*Soviet v. Parliament*); November 1920 (*President or Premier*).

modern statutes are mere *cadres*, giving no adequate indication of their ultimate scope. They lay down general rules and leave it to the Departments concerned to give substance to the legislative skeleton by the issue of Administrative Orders. This tendency has been noted not only by English publicists like the late Sir Courtenay Ilbert,[1] who, as Clerk of the House of Commons, had exceptional opportunities for close observation of the form of legislation, but by more detached critics of English institutions like President Lowell of Harvard. The latter, after a reference to the 'growing practice of delegating legislative power', adds:

'We hear much talk about the need for the devolution of the Power of Parliament on subordinate representative bodies, but the tendency is not mainly in that direction. . . . The real delegation has been in favour of the administrative Departments of the Central Government, and this involves a striking departure from Anglo-Saxon traditions with a distinct approach to the practice of continental countries.'[2]

It is true that *Provisional Orders* require statutory confirmation, but *Statutory Orders* become operative after 'lying on the table' for a given number of days. In both cases, therefore, Parliament retains formal control; in the latter case it is little more than a form.

The method of legislation by delegation raises many important questions which cannot be pursued here. There is one, however, which cannot be ignored. That the new methods have contributed to the rapid growth of public expenditure, as well as to the weakening of Parliamentary control over that expenditure, is undeniable. Nor will that control ever be re-established save by a drastic reform in Parliamentary procedure. The Select Committee on National Expenditure reported in 1918 that, in their opinion, the existing procedure of the House of Commons

[1] Cf. *Legislative Methods and Forms*, pp. 220–4.

[2] *Government of England*, i, pp. 363 seq.

was inadequate to secure proper Parliamentary control over national expenditure, and among other things they recommended that 'it should be established as the practice of Parliament that members should vote freely upon motions for reductions' in estimates, and 'that the carrying of such a motion against the Government of the day should not be taken to imply that it no longer possessed the confidence of the House'. That recommendation has not been adopted. The debates in Committee of Supply are, no doubt, valuable for the discussion of policy and administration; but it is difficult to traverse the opinion of the Select Committee already cited, that 'so far as the direct effective control of proposals for expenditure is concerned, it would be true to say that if the Estimates were never presented, and the Committee of Supply never set up, there would be no noticeable difference'.

It is not, however, only in regard to the examination of the annual Estimates that the present procedure of the House of Commons is defective; it is even more so in regard to ordinary legislation which may involve large and almost indefinite expenditure. Illustrations of this danger are numerous. One will suffice. When Old Age Pensions were introduced in 1908 the initial cost of the scheme was estimated by the Chancellor of the Exchequer at £6,000,000, with an expectation that it would rapidly rise to £7,500,000. The estimate for the current year (1924–5) is £24,000,000. Had Parliament in 1908 foreseen the probability of expenditure on a scale already so vast, and likely to increase still more, it might well have hesitated to accept so lightheartedly the non-contributory principle. Reference to this legislation is, however, permissible here only in illustration of a grave deficiency in our legislative methods and forms.

That deficiency may partially explain, even if it does not justify, the criticism that Parliamentary democracy or repre-

sentative government is already obsolescent and ought to be replaced by more direct methods.

The methods suggested are drastic in varying degrees. The one favoured by doctrinaires of conservative instincts is that of the 'Referendum', or the reference of legislative projects or Bills to the direct vote of the electorate. The arguments advanced in favour of this check upon the 'omnipotence' of Parliament are not lacking—particularly in view of the subordination of the Second Chamber—either in weight or authority. But the device, however well adapted to a political society like that of Switzerland, where the people have for centuries been habituated to the idea of direct democracy, is clearly repugnant to, if not inconsistent with, the principle of representative government. Still, if there is much more delay in the creation of an effective Second Chamber, some such device may become a necessary adjunct to the working of representative institutions under a Parliamentary democracy.

A more advanced, though still 'constitutional', school of reformers advocates the multiplication of representative Bodies based not upon localities but upon vocations. In the Trade Union Congress, the Co-operative Congress, the Association of Chambers of Commerce, the Federation of British Industries, perhaps even in the British Association for the Advancement of Science, the Church Congress, and the annual congresses of such bodies as Librarians, Teachers, Journalists, Grocers, and what not, we have Bodies which may possibly be regarded as *Soviets* in embryo. If the idea of a Parliament of Industry should materialize it would represent an even nearer approach to the Soviet principle. Nor is there any reason—provided that the legislative omnipotence of Parliament is carefully safeguarded—why subsidiary and sectional interests should not find representation in Bodies of the kind enumerated above, and why valuable results should not be obtained by them.

Of a wholly different character is the revolutionary movement which finds in 'Direct Action' its catchword and its ideal. The English apostles of this faith denounce Parliamentary government as an exploded myth and proclaim 'Direct Action' to be the 'short cut to the Dictatorship of the Proletariat'.[1] During the troubled years which immediately followed upon the signature of Peace with Germany—particularly in the years 1919–21—they seriously menaced the stability of the Commonwealth. Even the 'Constitutionalists' in the Labour Party were for a time disposed to philander with the dangerous doctrine of 'Direct Action'. Thus in June 1919 the Conference of the Labour Party at Southport, by a card vote of 1,893,000 to 935,000, accepted the policy of 'Direct Action', i. e. 'the unreserved use of industrial power as a means of compelling the British Government to keep its "hands off Russia"'.[2] The Trade Union Congress of 1920 confirmed this policy, and about the same time Mr. J. H. Thomas, as General Secretary of the National Union of Railwaymen, headed a deputation to Mr. Lloyd George, then Prime Minister, to 'negotiate' terms with the Government on behalf of the Irish railwaymen who had refused to handle cases of munitions intended for the use of soldiers or police in Ireland. Mr. Thomas candidly 'recognized that to support these men (the Irish strikers) meant a declaration of war on the Government'. The Prime Minister's retort was swift and effective: 'Not on this Government, but on government, which is a much more serious thing.'[3] It was finely and appositely said, and the truth of the aphorism is likely to be increasingly realized by Trade Union leaders who have

[1] Cf. R. Williams, *The New Labour Outlook*; W. Mellor, *Direct Action*, &c.

[2] F. J. C. Hearnshaw, *Democracy and Labour*, p. 12.

[3] Cf. *Under which King*, by the present writer, *Fortnightly Review* for August 1920.

since become responsible for carrying on the executive government of the country.

The 'Direct Action' movement may be said to have culminated in April 1921, when the 'Triple Alliance'—the miners, the railwaymen, and the transport workers—challenged the nation by the threat of a general strike. The peril was averted, partly by the intermediation of a large body of private members of all parties in the House of Commons,[1] partly by the discretion shown at the critical moment by the leaders of the railwaymen and transport workers and by Mr. Hodges, Secretary of the Miners' Federation, above all by the unmistakable resolution manifested by all sections of the community to support the Executive in any action they might deem necessary to defeat a dangerous conspiracy.

Defeated it was; the root principle of constitutional government was reaffirmed, and Parliament emerged from the crisis braced and invigorated by the strain to which it had been subjected. Yet no annalist of recent times can ignore the strength of the forces which, in those difficult days, threatened the existence of the hard-won inheritance of English freedom, and which, had they triumphed, would have substituted anarchy for Democracy.

§ III. NATIONAL AND LOCAL FINANCE.

For purposes of comparison (cf. p. 241 for the Budget of 1910–11) it may be useful to subjoin an outline of the Budget for 1924–5. It is needless to add that expenditure has in intervening years mounted much higher.

[1] A distinguished publicist describes this crisis as 'obviously the turning-point of the fate of the nation' (Hearnshaw, *op. cit.*, p. 22). The present writer may be permitted to add that as the member called to preside over the memorable meeting of Members of Parliament on Thursday, April 14, 1921, he writes with first-hand knowledge of the events.

Estimated Revenue (1924–5)	£	*Estimated Expenditure*	£
Customs	101,800,000	Consolidated Fund Services	384,840,000
Excise	135,900,000	Army	45,000,000
Motor Vehicle Duties	15,600,000	Navy	55,800,000
Estate &c. Duties .	56,000,000	Air Force	14,511,000
Stamps	21,000,000	Civil Services . . .	227,573,000
Land tax, House Duty, and Mineral Rights Duty . .	1,250,000	Customs, Excise, and Inland Revenue Departments . .	11,221,000
Income tax and Super-tax . . .	326,000,000	Post Office	51,081,000
Excess Profits Duty, &c.	8,000,000		
Corporation Profits Tax	20,000,000		
Non-tax revenue (including Post Office)	108,500,000		
Total Revenue . .	£794,050,000	Total Expenditure .	£790,026,000

Local expenditure has shown a similar tendency to increase since the first edition of this book was published. The following figures may be usefully compared with those given on p. 280 :—

	1921–2 £	s.	d.
Loan Debt	703,930,026	0	0
Debt per head of population (37,885,242) .	18	11	7
Debt per £1 of rateable value . . .	2	17	1
Aggregate amount of Rates collected . .	170,871,876	0	0
Rates per £1 of assessable value . . .		14	7¼
Rates per head of population . . .	4	10	2

The current rate of interest has increased since 1910 by about 1¼ per cent.[1] A first-rate industrial debenture now (1924) returns about 5¼ to 5½ per cent. ; a Municipal Corporation loan about 4¾ per cent. ; but it is noticeable that Local Authorities when raising large sums for housing purposes had generally to pay 6 per cent., and may have to offer a similar rate of interest if they again become large borrowers for similar purposes.

[1] Cf. p. 279.

§ IV. THE LIBERTY OF THE SUBJECT AND THE RULE OF LAW.

Recent tendencies in legislation render necessary some modification of the statements made on pp. 35 seq. and in Chapter XIV in reference to the supremacy of the 'Rule of Law' and to the exceptional degree and character of the personal liberty enjoyed by the subjects of the British Crown. More than half a century ago Herbert Spencer called attention to the dangers of 'over-legislation'; but the output of statutes in his day was small as compared with that of our own. The multiplication of statutes almost inevitably tends to the curtailment of individual liberty, but liberty has been curtailed even more perhaps by the character than by the volume of legislation. Reference has already been made to the marked tendency towards legislative delegation, to confer upon Public Departments the power to issue Orders or make Rules which have the force of law. Bacon observed that there is 'no worse torture than the torture of laws'. If he was right the modern citizen is evidently obnoxious to that form of torture to a degree undreamed of by the victims of mediaeval tyranny. Apart from this, however, there has been in recent years an equally marked tendency to confer by statute judicial or quasi-judicial authority upon permanent officials.[1] Such a tendency evidently offends against the famous canon of Montesquieu, who declared that only in a rigid observance of the principle of the separation of powers can liberty be found. To confer judicial authority upon the officials of the administrative Departments, and at the same time to invest them with the power to make Orders which have the force of law, is plainly to confound the Legislative power with the Executive and the Judicial

[1] On the whole subject cf. Dicey, *Law of the Constitution*, Introduction to 8th edition.

power with both. Moreover, it tends to blur the important distinction between what is and what ought to be. If those who are responsible for laying down the law are charged also with the duty of applying it, the menace to personal liberty must become acute, and the English citizen is likely again to incur risks from which the great contest of the seventeenth century was thought finally to have relieved him. The Judges may still be lions, but they are likely to become, as Bacon would have gladly made them, lions under the throne, though the throne is no longer occupied by a single monarch who can, at worst, be removed, but by the many-headed bureaucracy which can be dislodged, if at all, only by a sustained and gigantic effort.

It will be apparent, therefore, that the distinction between our own country, where we have long boasted of the supremacy of the 'rule of law', and those countries where the Executive can rely upon 'administrative law' interpreted by 'administrative tribunals', is somewhat less sharp than it was when this book was first published.

Nevertheless, we passed through the ordeal of a great war with a minimum infringement of those safeguards for personal liberty of which Englishmen have been justly tenacious. There was no recourse to the numerous coercive expedients adopted during the war against the French Republic, a century ago, though the Home Secretary by a regulation (No. 14 B) made under the Defence of the Realm Act was empowered to order the internment of any person 'of hostile origin or association' when he deemed it expedient in the interests of public safety.[1] Yet the amount of damage permanently inflicted upon the principle of personal liberty by the necessary precautions adopted during the war is so slight as to be negligible. If proof of

[1] Cf. on the whole subject *The War and Liberty*, pp. 55, 56, by the Right Hon. Sir Herbert Samuel (sometime Home Secretary)

this proposition were needed it would be found in the successful application of certain Irish deportees for a writ of *Habeas Corpus* against the Home Secretary (May 9, 1923). The Home Secretary, in handing over Art O'Brien and other subjects to the Irish Free State Government, acted on information that there was a conspiracy among supporters of the Republican movement in Ireland to commit acts of violence in England. But justified as his action may have been politically, the political plea did not avail to relieve him from the legal penalties incurred by a breach of the *Habeas Corpus Act*. Parliament did, indeed, subsequently indemnify him from the financial consequences of action justified on grounds of public policy; but the law was not the less vindicated, and vindicated on behalf of persons for whom no public sympathy could be invoked. To that extent the 'rule of law' remains intact and sacrosanct, and the main argument of the text (Chapters II and XIV) may consequently stand.

It should be noted (in reference to the statement on p. 295, *note*) that Borough magistrates are still appointed by the Lord Chancellor, but on the recommendation of Local Advisory Committees representative of all parties.

§ V. THE OVERSEAS EMPIRE.

The last fourteen years have witnessed several significant changes in respect to the British Empire. The area has increased from about 11,500,000 square miles (p. 307) to 13,909,782; and the population from about 400,000,000 to 460,094,000. Of that population the United Kingdom (to use a convenient though obsolete formula) claims 47,263,530, Canada nearly 9,000,000 (an increase of nearly 25 per cent.), Australasia nearly 7,000,000, South Africa nearly 7,000,000, East Africa 11,500,000, West Africa 22,000,000, and India (including Burma) over 300,000,000.

The Great War not only increased considerably the area and population of the Empire, but added to the varieties of constitutional status within it.

Africa exhibits those changes on the largest scale. Germany, welcomed by Great Britain to full partnership in the task of civilizing Africa in 1884, no longer retains a foot of territory in that continent. German South-west Africa has become the South-west Protectorate and been handed over to the Union of South Africa, which accepted, on behalf of Great Britain, a 'mandate' for that territory. The character of these mandates assigned by the League of Nations is defined by Article xxii of the covenant, and differs 'according to the stage of the development of the people, the geographical situation of the territory, its economic conditions, and other similar circumstances'. The mandate for South-west Africa belongs to Class 'C', applied to territories which 'can best be administered under the laws of the mandatory as integral portions of its territory, subject to safeguards in the interest of the indigenous population'. The mandate imposes upon the assignee certain responsibilities not only for 'the material and moral well-being and social progress of the inhabitants', but also to the League of Nations. To all intents and purposes, however, 'South-west' is now incorporated in South Africa.

German East Africa was divided between Great Britain and Belgium, and in both cases was accepted under a mandate of the Class B type. This differs in two respects from Class C. On the one hand, the mandated territory does not become an integral portion of the territory of the mandatory; on the other, it secures 'equal opportunities for the trade and commerce of other members of the League'. The British portion, now known as Tanganyika Territory, has a coast-line of 620 miles, an area of some 384,180 square miles, and an estimated pre-war native population of about 7,500,000. In West Africa, Togoland and the Cameroons

were divided between England and France, by whom they were accepted under mandate (Class B).

To the north of the Tanganyika Territory lies Kenya Colony and Protectorate, formerly known as the British East Africa Protectorate, and to the south of it Rhodesia, the southern portion of which has recently (1923) been endowed with a large measure of Responsible Government.

Egypt, formally proclaimed as a British Protectorate during the war, has since been surrendered, but the Soudan has been retained.

Palestine and Mesopotamia have been assigned under mandate to Great Britain. In the former case a British Protectorate of indefinite duration would seem to be contemplated, though Great Britain has, in accordance with Mr. (now the Earl of) Balfour's declaration of November 2, 1917, undertaken to place the country under such conditions, political, administrative, and economic, as will secure the establishment of 'a national home for the Jewish people', will develop self-governing institutions, and will safeguard the civil and religious rights of all the inhabitants of Palestine irrespective of race and religion. The intentions of Great Britain in regard to Mesopotamia are essentially different. Like Palestine it is lost to Turkey, and is entrusted to the guardianship of Great Britain, but specifically with a view to its 'progressive development as an independent state'.

The determination of the future of the islands of the Pacific led to considerable discussion at the Peace Conference, mainly between the Imperial authorities and those who primarily represented Australasian interests. The Australasian Governments were anxious to obtain direct control of the great rampart of islands stretching around the north-east of Australia. To their chagrin and disappointment this claim was only partially admitted. The islands north of the Equator were assigned to Japan; those south

of the Equator to Great Britain or its Dominions; the Bismarck Archipelago, German New Guinea, and those of the Solomon Islands which formerly belonged to Germany, to Australia; German Samoa to New Zealand, and Nauru to Great Britain—in all cases under mandate. Australia, however, insisted, despite the protest of Japan, that the mandate should be in a form consistent not only with her national safety, but with her 'economic, industrial, and general welfare'. That meant, in plain English, the exclusion of Japanese immigrants and the maintenance of a preferential tariff. The mandate was ultimately assigned under Class C, and Australia and New Zealand are thus placed in relation to their Pacific Islands in the same position as South Africa in relation to the South-west Protectorate.

From Australasia we pass to India (p. 321). Of the actual statutory changes in the government of countries comprised in the British Empire the most important are undoubtedly those which concern India.

By a resolution adopted in August 1917 the Imperial Parliament declared its intention to provide for 'the increasing association of Indians in every branch of the administration and the gradual development of self-governing institutions with a view to the progressive realization of responsible government in India as an integral part of the British Empire'. In the winter of 1917–18 the Secretary of State for India, Mr. E. S. Montagu, took the unprecedented step of visiting India and personally conferring not only with the Viceroy, but with representatives of all races, creeds, and classes in India, on the question of constitutional and administrative reform in India. On July 1, 1918, there was published over his signature and that of the Viceroy, Lord Chelmsford, an historic document, known as the Montagu-Chelmsford Report on Indian Constitutional Reform.

To the main recommendations of that Report the Imperial Parliament gave effect in the Government of India Act (1919).

The changes introduced by that Act into the Supreme Government of India though considerable are relatively unimportant. Now as formerly, executive power is vested in the Viceroy and his Executive Council, who are appointed by the Crown and responsible to the Secretary of State in Council and to Parliament. The Government remains in fact an autocracy tempered by a bicameral Legislature. The Council of State consists of not more than sixty members, of whom not more than twenty may be officials; the Legislative Assembly of 144, of whom two-thirds are elected. The right of granting supplies and of legislation is vested ordinarily in the Legislature, but in order to prevent a deadlock between the Legislature and the Executive, the Viceroy is empowered, when necessary, to override the will of the Legislature both in regard to legislation and taxation. Experience has already proved the necessity for this precautionary provision. There was also established in connexion with the Central Government an Indian Privy Council 'as a means of honouring and employing ripe wisdom and meritorious service', and a Council of Princes to provide a link between the Native States and the British Government. Provision was also made for the appointment of a High Commissioner for India in the United Kingdom.

Far more significant were the changes effected in the Provincial Governments. They were based upon the principle of *diarchy*, or a division of the functions of government into two sections: one dealing with subjects—such as justice and police—reserved for the exclusive jurisdiction of the Governor and his Executive Council (generally consisting of two civil servants); the other with subjects—such as local self-government, education, public health, excise, agriculture, fisheries, weights and measures, public works, and like matters—the administration of which is 'transferred' to Ministers chosen from and responsible to the elected local legislature or Legislative Council. The Legislative

Council contains at least 70 per cent. of elected members. For the performance of his 'reserved' functions the Governor can in the last resort make financial and legislative provision, against the will of the Legislature.

It is contemplated that if the new system works satisfactorily the range of 'transferred' subjects shall be enlarged until ultimately the whole administration is entrusted to responsible Ministers, and that responsible government, as soon as the capacity of Indians has been proved in the narrower sphere of the Province, shall be extended to the Supreme Government of India. But that day is not yet. Meanwhile India occupies constitutionally a position midway between that of a Dependency and a Dominion. That the experiment inaugurated by the Act of 1919, with the goodwill and the active support of all parties in the Imperial Parliament, involves considerable risks to India and to the Empire can be denied by none who is cognizant of the facts. But the most timorous of critics can only hope that the new policy will justify itself and speedily. Its failure would precipitate a crisis from the contemplation of which even the boldest must shrink.

The Montagu-Chelmsford reforms represent the free gift of the Imperial Parliament to India, a gift stimulated by recognition of the splendid services rendered by India to the Empire during the Great War. The attainment of Dominion status by Southern Ireland represents, on the contrary, the reward of successful rebellion against a war-wearied nation. Upon the circumstances which immediately preceded the conclusion of a Treaty between the Imperial Government and the representatives of Southern Ireland it were profitless, and in the present connexion happily irrelevant, to dwell. For four centuries prior to the Union Ireland (save during the Cromwellian Protectorate) had possessed a Parliament. The Statute of Drogheda, passed under the régime of Henry VII's Deputy, Sir Edward

Poynings, subordinated the Irish Parliament to the English Privy Council; the Act of 6 George I declared the competence of the English Parliament to legislate for Ireland. But in 1783 these Acts were repealed, and for eighteen years Ireland enjoyed a semblance of legislative independence under the 'Grattan Constitution'. The Napoleonic war combined with the outbreak of rebellion in Ireland to bring that experiment to an inglorious end. By the Act of Union Ireland was admitted to full partnership, political and commercial, with Great Britain; the Protestant minority received a guarantee for the maintenance of the Established Church, and to the Roman Catholics hopes of complete religious and civil equality were held out. Not until 1829, however, were those hopes realized, and then only as the result of renewed agitation. The Protestant Church itself was disestablished and disendowed in 1869, and between 1870 and 1905 a series of agrarian measures were passed, the ultimate effect of which was to transfer the ownership of the land in Ireland from the landlords to the tenants. Still agitation persisted. Mr. Gladstone had attempted in 1886 and again in 1893 to pass a Home Rule Bill for Ireland, but unsuccessfully; and not until after the passing of the Parliament Act was a Home Rule Act placed upon the statute-book. But by that time the Great War had broken out, and when in September 1914 the Royal Assent was given to the Bill, an agreed measure was simultaneously passed suspending the operation of the Act during the continuance of the war. Before the (legal) termination of the war was reached the Asquith Act was repealed and superseded by an Act for the Better Government of Ireland (1920).

This latter Act, a product of coalition government, was, in turn, as regards Southern Ireland, stillborn. Ever since the rebellion which broke out at Easter 1916 Southern Ireland had been in the grip of the Sinn Fein revolutionaries.

Nor were they induced to relax it by the passing of the Act of 1920. That Act provided for the establishment, at Belfast and Dublin respectively, of two Parliaments with Executives responsible thereto, and each Parliament was to contribute twenty members to an all-Ireland Council, which was intended to form the nucleus for an all-Ireland Parliament. The Act never operated in Southern Ireland; the Nationalists bitterly resented the idea of partition; the Sinn Feiners would accept nothing short of an Irish republic.

Northern Ireland, or six counties of Ulster, accepted and have loyally and successfully worked a semi-federal scheme —('federal' in so far that they are still represented at Westminster)—as at least preferable to subordination to a Dublin Parliament. Southern Ireland adopted the principle of non-co-operation; refused to work the Act and carried on a guerrilla war against the forces of the Crown. In July 1921, however, a truce was proclaimed, and the Sinn Fein leaders accepted an invitation to negotiate with the Government in London. After much haggling and delay the offer of 'Dominion status', with certain conditions, was accepted; in December 1921 a Treaty was signed, and on March 31, 1922, a Bill embodying its terms received the Royal Assent. Ireland was to enjoy full Dominion status, under the style of the Irish Free State, and to form, under the British Crown, a member of the British Commonwealth of nations; the six counties of Ulster retaining the right, since exercised, to contract out of it. Like Canada, the Irish Free State has applied for permission to appoint a Minister to represent her at Washington, and the British Government has assented to the request (1924).

The demand for separate diplomatic representation evidently raises questions, constitutional and international, of extreme delicacy. In a sense it forms a logical sequel

to the position claimed by the Dominions at the Peace Conference at Paris, and to the recognition of their 'national' status in the Assembly of the League of Nations. That recognition was not accorded without demur by Foreign States, and the 'over-representation' of the British Empire unquestionably formed one of the obstacles to the adhesion of the United States of America. 'National' status is one thing; 'international' status is another; and the Dominions may perhaps discover that the latter is more difficult to achieve than the former. The Treaty-making right is plainly involved in it, and the American Senate exhibited its reluctance, in 1923, to conclude, at the instance of the Canadian Government, a Halibut Fisheries Treaty except with 'Great Britain'. The Treaty was indeed ratified by the Senate, as the U.S. Secretary of State informed the British Ambassador, 'subject to that understanding'. The attitude taken up by the Canadian Government in reference to the Treaty of Lausanne (1924) affords further illustration of the difficulty and delicacy of the existing position.

It would be the height of unwisdom to assume that this position will be permanent or even perhaps prolonged. That the Great War should have produced an upheaval in ideas, constitutional no less than social, is only in accordance with expectation. The upheaval has not yet spent its force. Experience, however, teaches that after a period of physical strain and spiritual exaltation there invariably ensues a time of reaction, restlessness, and recoil. Political institutions have not escaped from the operation of the general law. With everything else they have been flung into the cauldron. What will emerge none can foretell.

The foregoing paragraphs may at least serve to indicate that the recent past has been crowded with events of high significance, and that in the sphere of Politics large developments have been in progress, the ultimate goal of which

none may discern. But if the dead must bury their dead, the future must take care of itself. The British Commonwealth of Nations is among political organisms unique; it cannot therefore be deemed remarkable that the problems which it presents to the student of Politics should be unprecedented. Thirty years ago the centripetal forces seemed to be going from strength to strength; the unification of Italy and of Germany; the *Ausgleich* between Austria and Hungary; the repeated rebuffs to Irish separatism; the advance of Switzerland towards federal unity; the recent triumphs of federalism in the United States and Canada, and its imminent triumph in Australia—all seemed to point to the final defeat of the centrifugal and disruptive elements in the modern state. Who could have foreseen that a Great War would result in the overthrow of many centralized autocracies, the dismemberment of Empires, the exaltation of political particularism, and the resurgence of the small Nation-State?

That the British Commonwealth, despite its unique conformation, should altogether escape from the influence of centrifugal forces, elsewhere triumphant, was not to be expected. Whether those forces will in time obey the law of reaction, or will ultimately prevail, is a question for the philosopher to ask, but not for the historian to answer.

THE
CONSTITUTION IN TRANSITION

National character finds expression in different countries through different media. In some countries it is expressed in Art; in others in Literature; in England it is most characteristically expressed in those political institutions which in the aggregate form the English Constitution. But that Constitution, depending less upon Statutes, as already explained,[1] than upon conventions and precedents, is subject to perpetual modification. From year to year the changes are hardly perceptible; but by periodical surveys they are revealed, and, if the analysis is to be accurate at any given time, must be recorded.

Such a survey was attempted in 1925 after this book had for fourteen years run its course. Another fourteen years having elapsed, a second survey is demanded.

Since 1925 there has happily been nothing in the nature of a cataclysm, though what might have happened had the General Strike of 1926 not been peacefully and decisively defeated none can say. Developments, however, there have been, arising mainly from rapidly changing social and economic conditions; they have been effected partly by legislation, but still more by administration, and have made a marked impression upon the Body Politic as a whole, and upon all its members. To facilitate reference, these developments will be treated, as far as possible, under the heads adopted in the original chapters.

§ I. THE CROWN.

Of all the developments during recent decades, incomparably the most important is that which has affected the

[1] Cf. pp. xvii, 26 f.

position of the Crown, and still more, perhaps, the place of the King in the national polity. The development is specially marked in the relation of the Crown to the Overseas Empire, and will accordingly be analysed in a later section.

There has, however, been a change more subtle, but not less significant, in the position of the Monarchy in the insular kingdom. The Monarchy, it is commonly said, has, like all other institutions, been 'democratized'. The statement is accurate if it means that King George V and his Queen came into more intimate personal contact, and into closer sympathy, with all classes of their subjects, than any previous occupants of the throne. Common sorrows and common anxieties resulting from the four years' agony of the Great War forged fresh links between King and people. Those links have been strengthened and deepened by the use to which King George V was the first king to put the radio. In particular, the near relationship was revealed and accentuated by that King's homely messages to his peoples at Christmastide. Sitting in his own study, he spoke to them as they sat in their homes, humble and stately alike, in all parts of his world-wide Empire. Most homely and most characteristic were the words, 'very simple but spoken from the heart on this family festival of Christmas' (1935). The King having recalled 'the spontaneous offering of loyalty—and may I say of love?' called forth by his Silver Jubilee, proceeded: 'How could I fail to note in all the rejoicings not merely respect for the Throne, but a warm and generous remembrance of the man himself who, may God help him, has been placed upon it. It is this personal link between me and my people which I value more than I can say. . . . I feel this link now as I speak to you. For I am thinking not so much of the Empire itself as of the men, women, and children who live within it, whether they are dwelling here at home or in some distant outpost of the Empire.' The many millions who heard those words felt instinctively that

they did in truth come from the heart of one who was at once their King-Emperor and the head of the great family to which they themselves belonged.

No previous sovereign could have spoken them. Queen Victoria was, in her later years, deeply venerated. Her Jubilees were superb pageants of Empire. The Silver Jubilee of King George V was more in the nature of a 'family festival'. Never was the Throne weaker than in the decade after the Prince Consort's death. Murmurings were heard on platforms and even in Parliament against the seclusion maintained by the 'Widow of Windsor'. The word 'Republic' was heard, and there were even members of Parliament who recommended a change in the form of Government. The sentiment was neither deep nor widespread: but the mere suggestion was significant.

There is no longer a trace of it. King Edward VII was popular with all classes, and most admired by those who knew him best. But he was not personally known to great numbers of his people. King George was widely known, and the better he was known the more he was loved. By his reign the throne was greatly strengthened; it was not shaken by the abdication of his son. That untoward incident also furnished a searching test for the new Imperial Constitution, to be presently described.

§ II. THE CABINET.

The Cabinet which for three years (1916–19) was virtually superseded by a War Directory has since 1919 reverted to the pre-War type. There has, however, been some demand, mainly in the interests of National Defence, for another trial of the War-time experiment.[1] But the experiment was not perhaps so demonstrably successful as to justify repetition. Another war-time innovation—the Cabinet Secretariat—has,

[1] See *supra*, pp. 12–14.

however, survived, and has done much to regularize the procedure and increase the efficiency of the Cabinet.

§ III. PARLIAMENT.

There has been no formal change in the position of either House of Parliament since 1928. The number of Peers of the United Kingdom has steadily increased, but that of Irish Representative Peers has diminished. The Act of Union fixed the number at twenty-five; but since the Government of Ireland Act (1922) there has been no further election. The Lord Chancellor of Ireland, who was alone competent to convene the Peers of Ireland for the purpose of electing representatives in the Imperial Parliament, has been eliminated. Consequently, in the absence of Irish elections, the number of Irish Representative Peers has shrunk to sixteen. The position is, however, entirely anomalous. The clause in the Act of Union providing for the representation of the Irish Peers in the united Upper House is unrepealed; but the privilege it conferred has been virtually abrogated. Yet the disability remains. An Irish Peer resident in the United Kingdom cannot vote at a Parliamentary election though he can sit, if elected, in the House of Commons.

Despite the circumscription of its legislative powers under the Peerage Act of 1911, the House of Lords has suffered no diminution in its prestige as a deliberative and debating assembly. On the contrary, the Second Chamber, containing, as it does, an ever-increasing proportion of the best business brains in the country, containing also experts in most branches of public administration, can make an invaluable contribution to the discussion of subjects which are apt to receive inadequate attention from the House of Commons. An overdue reform, permitting Ministers of the Crown to speak (as in most countries they can), though not to vote, in either House would add greatly to the efficient conduct of business in both Chambers.

The House of Commons has undergone a marked change during the last two decades. This is due to the virtual supersession of the Liberal Party by Labour representatives. The Labour Party has come to be recognized as the 'official' Opposition; its leader (since 1937) has received in that capacity an official salary, and it has twice—in 1924 and in 1929—formed a Government, though in neither case could the Party command an independent majority in the House of Commons.

To pretend that the advent of 'Labour' has not affected the amenities of the House of Commons as a 'Club' would be affectation; but happily it has in no degree impaired the *camaraderie* among its members, nor diminished their common pride in Parliament as a political institution.

That institution is now based upon the broadest foundations. By the Equal Franchise Act of 1928 women were placed in the same position as men as regards both Parliamentary and Local Government elections. Adult Suffrage brought the electorate of Great Britain up to the vast total of 30,562,778, including no fewer than 16,151,823 women. 'Thus ended in complete and simultaneous victory the long fight for "equal rights", and the still longer fight, begun by the Chartists, for Adult Suffrage.'[1]

A remarkable experiment initiated in 1931 demands notice, though whether it is likely to survive the passing of the emergency which led to it remains uncertain.

In August 1931 Great Britain was threatened by a serious financial crisis. The Labour Ministry then in office resigned, and a National Government representative of all three parties in the State was formed under the Premiership of Mr. Ramsay MacDonald.

The new arrangement was emphatically endorsed by the

[1] Marriott, *Modern England*, p. 329. 'Adult' Suffrage was the original demand of the Chartists, though 'Manhood Suffrage' was ultimately substituted on grounds of expediency.

Electorate in 1931, and again, though with somewhat less emphasis, in 1935. In the meantime the Ministry had shed some of its Liberal members, as well as its Socialist Chancellor of the Exchequer, Mr. Philip (Viscount) Snowden.

Between 1931 and 1935 the party-system was almost completely in abeyance and the House of Commons virtually resolved itself into a 'Council of State'. The result of the General Election of 1935 was to restore, in some measure, party alignments, but the Ministry still includes, and is supported by, members of all parties. Simultaneously the House has reasserted its legislative independence and has resisted the tendency, increasingly manifested in recent years, towards the dictatorship of the Executive. More than one important law recently enacted owes its existence to the initiative of a private member, and not infrequently have the legislative projects of the Cabinet been substantially modified in the course of their passage through Parliament. Nor has the House of Commons failed to exercise a sensible influence upon the conduct of the administration, stimulating it to activity in one direction, restraining it in others.

In one of its most ancient and important functions the House of Commons has, however, shown itself lamentably negligent. It has conspicuously failed to exercise its 'ancient habit of control' over public expenditure.

§ IV. FINANCE.

To compare the estimated expenditure for the year 1938–9 with that provided for the year in which this book was first published (1910–11) may to a post-War generation appear fantastic.[1] To those who can recall Victorian standards of expenditure it is profoundly perturbing. Even as compared with the Budget of 1924–5 (see p. xl), it must cause much heart-searching. The figures for the current year (1938–9) are as follows :—

[1] For the Budget of 1910–11 see *infra*, p. 241.

Revenue (*Estimated*) 1938–9	£
Inland Revenue, Income Tax, Surtax, &c.	536,500,000
Customs and Excise	344,100,000
Motor Vehicle Duties	36,000,000
Total from Taxes .	916,600,000
Non-tax Revenue .	28,150,000
	£944,750,000

Expenditure (*Estimated*) 1938–9	£
Consolidated Fund Services	242,100,000
Defence Services,* excluding Pensions	234,159,000
Pensions (Military) .	19,089,000
Civil Services . . .	442,766,000
Margin for Services .	10,000,000
Tax Collection, &c.	14,284,000
	£944,398,000

*Additional to (£90,000,000 to be met by loans).

It will be noted that the total expenditure has increased by some £150,000,000; but the expenditure for 1924–5 included £51,081,000 for the Post Office, an item which is now very properly excluded, as it is more than balanced by receipts. The real increase in the bill is consequently over £200,000,000. The increase in the Defence Services is more than balanced by diminished charges on the Consolidated Fund. The really serious feature is, therefore, the prodigious increase of nearly £220,000,000 in the cost of the Civil Services, which has nearly doubled since 1924–5. For this increase the 'Social Services' (including Health Services, Insurance, Old Age and Widows' Pensions, and Education) are mainly responsible.

The national accounts do not, however, tell the whole story. The Local Authorities, stimulated to vast expenditure by the Central Government, will, in the current year, collect over £196,000,000 in rates. This represents an increase of about 25 per cent. even in the last five years, and as much again is met out of Exchequer grants. The total expenditure, therefore, of Local Authorities is now not much short of £500,000,000. The aggregate of Local Debt exceeds £1,500,000,000—or double the amount at which it stood in 1925, and double the amount of the National Debt before

the War. During the same period the National Debt has risen from about £700,000,000 to nearly £8,000,000,000.

These figures may well appal the economist, especially when compared with the figures representing the current expenditure and indebtedness of other countries. But they would not be emphasized in this work, did they not throw a lurid light upon one of the most important developments of national policy and upon the adaptation thereto of political institutions.

§ V. CENTRAL AND LOCAL ADMINISTRATION.

Briefly and broadly, it may be said that Great Britain, formerly the champion of Individualism and strongly inclined in government to the principle of *laissez-faire*, is now, to a large extent, a Socialized State. Functions which until recently were left to private citizens and voluntary associations are now performed by the State and by an army of officials, some of whom are responsible to Whitehall and others to Local Authorities dispersed throughout the land. Bureaucracy, central and local, is triumphant. Welcomed, or at the least accepted, by a considerable body of public opinion, this development is viewed by some keen observers with grave apprehension. Lord Hewart, the Lord Chief Justice of England, regarding it as a grave menace to personal liberty, describes it as 'the New Despotism',[1] and, like other jurists, connects it with the subtle growth in this country of Administrative Law (*Droit Administratif*). Detailed discussion of this matter would, however, involve a controversy alien to the purpose of this book. Between the opposing schools of thought readers must decide for themselves. About the facts there can be no dispute.

[1] Lord Hewart, *The New Despotism* (1929); C. K. Allen, *Bureaucracy Triumphant* (1931); J. A. R. Marriott, *The Crisis of English Liberty: Report on Ministers' Powers* (Cmd. 4086) (1932); F. J. Port, *Administrative Law*; W. A. Robson, *Justice and Administrative Law* (1928); C. J. Carr, *Delegated Legislation* (1921).

§ VI. LOCAL GOVERNMENT.

Of all the changes that have occurred since 1925, the most fundamental as regards the United Kingdom are those which have been effected in the sphere of Local Administration. The change was legally effected by the Rating and Valuation Act of 1925, the Rating and Valuation (Apportionment) Act of 1928, and by the Local Government Act of 1929 (19 George V, c. 17).

These Acts formed the constituent parts of a coherent scheme and must be considered as a whole. The Acts of 1925 and 1928 supplied a necessary prelude. They simplified the machinery for levying local taxation (rates), and for the valuation of the property on which the rate was to be assessed. They abolished the historic office of the Parish Overseers who, since the Elizabethan Poor Law, had been the linchpin of the whole system of Poor Relief. They made the councils of every borough (including County Boroughs), and of all other urban and rural districts, the sole rating authority for their respective areas, thus reducing the number of rating authorities from 15,546 to 1,767. The draft valuation lists are prepared by these authorities, but in County Boroughs and in assessment areas, consisting of one or (generally) several rating authorities, there is set up an Assessment Committee which is linked up with a Central Valuation Committee designed to secure uniformity in assessments. Any objector to an assessment may appeal to Quarter Sessions and thence on a case stated, through the intermediate courts, up to the House of Lords. In December 1930 there were said to be 18,000 appeals pending to Quarter Sessions and 800 to the Divisional Court.[1]

The Local Government Act of 1929 placed the coping-stone on the legislative structure. In moving the Second Reading on November 26, 1928, Mr. Neville Chamberlain indicated five defects which the Bill was designed to remove:

[1] Wade and Phillips, *Constitutional Law*, p. 265.

(i) the confusion, waste, and inefficiency involved in the overlapping functions performed by, and overlapping areas presided over by, the existing Poor Law guardians; (ii) the onerous charges imposed upon the highway authorities, especially in the small rural districts, for the maintenance of roads; (iii) the inelasticity in the power of altering local boundaries in accordance with changing conditions; (iv) the inequitable system of rates which threatened agriculture and productive industry with strangulation; and finally (v) the chaotic relations between national and local expenditure resulting in the least relief where local needs are greatest.

Of these defects the first was to be removed by the abolition of the existing Poor Law authorities—Boards of Guardians—and a drastic reform in the administration of the Poor Law. 'Public Assistance' was to take the place of Poor Relief; the 'stigma' of pauperism was to disappear, and an Institution to take the place of the Workhouse—the 'Poor Law Bastille', denounced by Disraeli and Thomas Carlyle. Responsibility for Public Assistance was committed to County and Borough Councils, which were to appoint Standing Committees, at least two-thirds of whose members were to be members of the Council, while the other third might, if thought well, be co-opted. In every case women were to be included among the co-opted members. Counties were to be divided into areas, in each of which a 'Guardians' Committee' was to be constituted: it was to number 12–36 members and to include the local representatives on the County Council, non-county boroughs, and district Councillors nominated by their Councils, and co-opted members, who were to include women, and to be chosen with reference to their previous experience in Poor Law administration. Thus local knowledge was to be utilized and a measure of continuity maintained. The Public Assistance Committees were also to provide 'all assistance which can lawfully be provided' in relation to such matters as hospitals, tuberculosis,

maternity and child welfare, the care of the blind and mentally deficient, and medical inspection and treatment of school children. It is obvious that this injunction is likely to reproduce many of the evils of overlapping—especially in respect of financial assistance—that the Act was designed to avert. That has not, however, deterred Public Assistance Committees from a 'forward' policy in administering the Act.

The functions of the Boards of Guardians in regard to the Registration of Births, Deaths, and Marriages were also transferred to the Public Assistance Committees.

The second defect concerned the maintenance of roads. The responsibility for the maintenance of all roads in rural districts and of through communications in boroughs and urban districts outside the County Boroughs was transferred to the County Councils, which were also to be responsible for all Class I and Class II roads within the same limits. Thus the small rural districts were relieved of a burden which had become 'absolutely intolerable'. The main charge for the highways falls, however, upon the 'road fund' now transferred to the Exchequer.

The problems of town-planning and of local boundaries are evidently closely bound up with that of highways. The problems would have been accentuated by the road provisions of the new Act. Accordingly, the Act gave the Local Authorities power to make joint schemes for town-planning to be run by joint committees, and it provided also for the periodical revision of existing boundaries, in consultation with the Local Authorities concerned.

At the root of all these problems was that of Finance. The existing system of Exchequer grants was not only exceedingly complicated, but wholly inequitable, and Local Expenditure had gone up from 8*s.* 9*d.* per head in 1841 to £6 10*s.* per head in 1920. The expenditure of Local Authorities had increased from about £36,000,000 in 1891 to nearly £250,000,000 in 1927, and the burden fell most

heavily, and was least relieved by the Exchequer, in the neediest areas. It would, as Mr. Chamberlain said, be 'impossible to imagine a greater hotch-potch and confusion' than the way in which the Exchequer grants were distributed without any reference to the means and resources of the various areas. Oxford, for example, received from the Exchequer 102*d.* per head of its population, the distressed town of Middlesbrough received 26*d.* The East Riding of York received 244*d.*, the County of Glamorgan 43*d.* These anomalies arose from the system of percentage grants which went in largest measure to the districts which could afford to spend most lavishly on Social Services. The Act went far to replace that system by 'block grants', making the largest Exchequer contributions to localities, not according to their capacity to spend, but in proportion to their poverty and their needs.

No apology is offered for the space allotted in these pages to the Reforms of 1925–9. They were not only of the highest intrinsic importance, but, more comprehensively if not more accurately than any other Enactments, they reflected the new spirit that has, in recent years, inspired public administration.

§ VII. HOUSING.

Of the operation of that new spirit there is no better illustration than the effort made since the War to provide better housing accommodation for great masses of the population, not least for the poorest inhabitants of slum tenements and of overcrowded dwellings beyond the actual slum areas.

Public attention was first directed to defective housing conditions by Disraeli's Public Health Act and Artizans' Dwellings Act of 1875—instalments of his 'policy of sewage'. The report of a Royal Commission appointed in 1885 was followed by the Act of 1890 which initiated, on a very

modest scale, the policy of housing subsidies and made a beginning with slum clearance. But, despite further legislation in 1900, 1903, and 1909, progress was very slow; it was retarded by the discouragement of private enterprise arising from the People's Budget, 1909–10, and was entirely arrested by the Rent Restriction Act of 1915—and by the preoccupation of the War.

As soon as the Armistice was signed and demobilization began, a clamant demand arose for 'houses fit for heroes to live in'. The Coalition Government accordingly passed in 1919 an Act known as the 'Addison' Act, under which 175,000 houses were built at an average cost of £1,000 apiece, to subsidize which the taxpayers and ratepayers are paying some £6,000,000 a year. An Act passed in 1923 by Mr. Neville Chamberlain, as Minister of Health, produced over 400 coo houses, with the aid of a modest subsidy of £6 a house for twenty years.

Mr. Wheatley, in 1924, extended the period to forty years and increased the subsidy to £9. The Wheatley subsidy was continued until the financial crisis of 1931 put an end to subsidies altogether. The Wheatley Act did, however, produce over half a million houses.

In all, since the Armistice, over 3,600,000 new houses have been built in Great Britain and over 14,000,000 people have been rehoused. Out of the total some 2,000,000 houses have been built without any assistance from rates and taxes; but to the building of the rest the Exchequer has already contributed £180,000,000, and the State and the Local Authorities are further pledged, on account of them, to an annual payment of £17,500,000.

In 1933 a campaign was launched for the demolition of houses unfit for habitation and the rehousing of their occupants. Since that time about 900,000 slum-dwellers have been rehoused, and considerable progress has also been made in the reduction of overcrowding. A systematic survey

of over 8,000,000 dwellings in England and Wales has been carried out, and with the aid of a State subsidy nearly 10,000 new houses have been built for the evicted occupants of the overcrowded premises. A beginning has also been made under the Housing of Rural Workers Acts of 1926–36 for reconditioning cottages, to be let at rents—again with subsidies from the State and Local Authorities—within the means of farm labourers.

Towards the improvement of social conditions, a real contribution has thus been made by the housing policy pursued since the War. The cost has been heavy, but bad housing conditions have been responsible for much suffering, sickness, immorality, and crime—especially juvenile crime, and there is ground for hope that the results of the policy will gradually become manifest in the improved health and the increased happiness and well-being of a large section of the population. If these things should issue in a higher standard of citizenship, they cannot fail to react upon the working of political institutions in a Democratic State. But results, if hopefully anticipated, cannot yet be gauged.

To turn to modifications in the machinery of government more directly 'political'.

§ VIII. THE ADMINISTRATION OF JUSTICE.

With one exception—and that rather in form than in substance—there has been no fundamental change in judicial machinery since the great reforms of 1873–94.[1] There has been an increase in the number of judges and a great increase of business in the Probate and Divorce Division of the High Court, and in the County Courts, to which more and more people resort for justice, which is administered promptly, efficiently, and cheaply. Even more notable is the increased reliance upon the efficiency, and still more strikingly

[1] See *infra*, c. xiv.

upon the humanity, of the Courts of Summary Jurisdiction. The functions, criminal and social, of those Courts have in recent years enormously increased, and more competent observers agree that the results have been eminently satisfactory. Magistrates, especially, perhaps, in London, are increasingly regarded as the friends and advisers of the poor. Matrimonial disputes are, with touching confidence and in rapidly increasing numbers, referred to them for settlement.

At the other end of the social scale are the Quarter Sessions, where justice, ever since Elizabethan times, has been administered by the unpaid J.P.s of the County. In the Petty Sessional Courts also the judges are mostly unpaid J.P.s.

These unpaid magistrates deal every year with more than half a million non-indictable offences, and at Petty or Quarter Sessions they dispose of not less than 95 per cent. of indictable offences.[1] Under these circumstances it is not remarkable that there should be some demand for the supersession of the lay magistrates and the universal employment of stipendiary professional lawyers. In London, and in all the larger provincial boroughs, the stipendiary system is universal, and in all boroughs that have Quarter Sessions, the presiding judge or Recorder is paid. In the Counties they are not paid and in some cases are not even lawyers. The work of the lay magistrates is on the whole so well done that they are not likely to be entirely superseded, but an Act was passed in 1938 to extend the jurisdiction of Quarter Sessions and at the same time to provide that the chairman or deputy-chairman should possess legal qualifications. Where these are not obtainable without remuneration, chairmen are henceforward to receive a salary. These changes should discourage the readiness of Justices to commit to Assizes cases which can well be disposed of in Quarter Sessions, and consequentially to relieve Judges of Assize, who are empowered by the Act to determine when an Assize should be omitted

[1] For the distinction see *infra*, p. 295.

by reason of the absence of business requiring their attendance.

A change of great interest to the historian and not unimportant to the citizen may here be mentioned. The Grand Jury was the lineal descendant of the Saxon Jury of Presentment and the Frankish or Norman Jury of Recognition. Their function had long been to prevent a criminal case going before a Judge of Assize and a 'Petty' jury without their assent, expressed by finding a 'True Bill'. Doubtless the performance of it had become in the vast majority of cases purely formal, and to that extent a waste of a judge's valuable time. But it was in the face of protests from distinguished jurists[1] and old-fashioned champions of liberty that this ancient institution, having been temporarily suspended during the Great War, was in 1933 abolished by statute.

Of the Judicial Office as a bulwark of personal liberty Parliament has recently shown itself jealous by restoring the 'cuts' made in the salaries of judges in 1931. To those 'cuts' they were subject like other civil servants and Ministers. But the judges are not members of the Executive, permanent or political; they stand to the citizen in a wholly different relation; and the difference should be not merely recognized but emphasized. To use archaic language, the judges are 'lions, but not lions under the Throne'. They are not, therefore, 'servants' of the Executive, and their position in reference to the Legislature is a peculiar one. Their salaries are not, like those of Ministers and civil servants, subject to the annual vote of Parliament, but are charged on the Consolidated Fund, and judges can be dismissed only with the assent of both Houses. It is indisputable that the judicature should be independent alike of the Legislature and the Executive is a matter of great, and, in view of contemporary tendencies,[2] of ever-increasing importance to the liberty of the subject.

[1] e.g. Sir W. Holdsworth. [2] See *supra*, p. xli f. and p. 275.

§ IX. THE OVERSEAS EMPIRE AND THE CROWN.

Of all the changes that have taken place in the British Polity since 1925 the most important have affected the Overseas Empire and the relation thereto of the United Kingdom and the Imperial Crown.

The Empire contains more than fifty separate units in almost every stage of political and economic development. But broadly we can distinguish four main groups, all of which, with the exception of India, are technically and legally known as Colonies.[1]

Outside the main groups are the 'Mandated Territories'.[2] These consist mainly of the Overseas possessions formerly held by Germany and, under Article 119 of the Treaty of Versailles, renounced by her in favour of the principal allied and associated Powers, and of some territories which had belonged to the Ottoman Empire.

Among the mandates accepted by Great Britain was that for Mesopotamia (Iraq). It was assigned to her with the specific object of preparing that country for self-government and complete independence. The task was no light one, but in 1924 a Parliamentary Constitution was adopted in Iraq, and under the strong and patient administration of Sir Percy Cox and Sir Henry Dobbs order was gradually evolved out of chaos. Their work was consummated in 1932 when the British Mandate was determined and Iraq was admitted as an independent State to membership of the League of Nations.

In Egypt also British responsibilities were curtailed, though not terminated, by the conclusion of a Treaty of Alliance with that country (August 1937). Only in the years 1914–22 had Egypt been actually included in the British Empire as

[1] See p. 309.

[2] For explanation of the system of Mandates and their assignments see *supra*, p. xliv.

a Protectorate, though the country had been in 'occupation' of Great Britain since 1882. England's 'special position' in Egypt, due not only to the military occupation but still more to the regeneration effected by Lord Cromer, was recognized by the Anglo-French Agreement of 1904. In 1914 the Turkish suzerainty was abolished, the reigning Khedive was deposed and replaced by his uncle, and Great Britain declared a Protectorate over the country. Nationalist sentiment in Egypt was, however, strongly opposed to British tutelage, and in 1922 the British Government declared the Protectorate to be at an end and Egypt to be an 'independent Sovereign State'. But independence was limited. Certain important matters were reserved until an arrangement could be reached and embodied in a definite Treaty. Pending its conclusion, the *status quo* was to remain intact.

Years of negotiation, interrupted by tragic events in Egypt, ensued. But in 1936 the military occupation was superseded by a permanent military defensive alliance. The Treaty recognizes the paramount interest of the British Empire in the Suez Canal, entrusts its defence to British troops, and maintains the Anglo-Egyptian Condominium over the Sudan, which had been conquered and regenerated by Great Britain.

The contraction of responsibilities is not easy, if indeed it is practically possible, for an Imperial Power. Yet the sincerity of England's anxiety to effect it, so far as is compatible with the interests of the peoples for whose well-being she has made herself responsible, can be questioned only by those who deride us as a nation of hypocrites.

Take India. Ever since the Crown assumed (1858) the direct government of British India, it has been our avowed object to train Indians in the art of self-government. Steps in that direction down to the passing of the India Act (1919) have already been indicated. The Constitution, devised in that Act, was formally inaugurated in 1921 by the Duke of Connaught, on behalf of the King-Emperor.

The Act *inter alia* provided that at the end of ten years a Statutory Commission should be appointed by the Imperial Parliament to examine the working of the experiment, and to report on the desirability of extending, modifying, or restricting the degree of responsible government conferred upon British India by the Act of 1919. In the event the period of probation was curtailed; in 1927 an all-party Royal Commission was appointed under the chairmanship of Sir John Simon, and, after two visits to India and an exhaustive examination of the whole situation in India, presented to Parliament its Report.

Part I of the Report contained a masterly survey, historical and analytical, of conditions in British India. That survey revealed certain 'stubborn facts which no amount of rhetoric or appeal to abstract principles [could] alter'. The proposals of the Commission, contained in Part II, were based upon two general principles The first was that 'Indian nationalism is a phenomenon which cannot be disregarded by the rulers of British India or of the Indian States'. A second affirmed that it is only under a federal system that the sentiment underlying the [nationalist] movement can be given effective expression. Accordingly, the Constitution to be framed must have regard to 'a future development when India as a whole, not merely British India, will take her place among the Constituent States of the Commonwealth of Nations united under the Crown'. Specific recommendations followed, but as these were superseded by the proposals embodied in the Act of 1935 they have ceased to possess anything more than academic interest.[1] Far otherwise was it in regard to the general principles enumerated above. They were accepted and emphasized, as will be seen, in the Scheme ultimately adopted by Parliament.

Before the Scheme was submitted to Parliament the whole

[1] The curious will find them, together with further details on the whole subject, in Marriott, *The English in India*, p. 280 f.

subject had been meticulously discussed in a series of Round Table Conferences (September 1930 to March 1933), which were attended by Indian representatives, as well as by English statesmen of all parties. The Government had meanwhile (in 1931) announced the main lines of their policy in a White Paper.[1] Three small Committees had been sent to India to investigate and report upon the three subjects of the Franchise, Finance, and the Indian States.[2] After the third Session of the Round Table Conference, the reconsidered and revised proposals of the Government were embodied in a second White Paper[3] laid before Parliament. A Joint Select Committee of Lords and Commons was then appointed 'with power to call into consultation representatives of the Indian States and British India' to consider the proposals. It sat under the Chairmanship of the Marquis of Linlithgow, now (1938) Viceroy of India, and after holding 159 meetings it reported its approval of them.

Never, it can be confidently said, has any great Constitutional measure been submitted to Parliament after more prolonged, careful, and detailed consideration and reconsideration. The resulting Bill was piloted through the House of Commons with great patience and skill by Sir Samuel Hoare and in 1935 received the Royal Assent.

The Act of 1935, which reconstructs both the Central and the Provincial Governments, rests on three main foundations: (i) All-India Federation; (ii) Provincial autonomy; and (iii) 'Responsibility with Safeguards'. All-India, the Feudatory States as well as British India, is to be united into a Federal whole. The units are to be formed of (i) the Governor's Provinces of British India, and (ii) such Feudatory States as shall accede to the scheme. But the

[1] Cmd. 3972 of 1931.

[2] Reports Cmd. 4068, 4069, and 4103 of 1932. A small Committee headed by Sir Harcourt Butler had previously (1929) reported on the relations between the Crown and the Indian Princes.

[3] Cmd. 4268.

All-India Federation cannot come into existence until the Rulers of States representing at least one-half of the aggregate population of the States, and entitled to at least half the seats in the Upper Federal Chamber, have presented an Address to the Crown praying for the establishment of the Federation. Thus the key of the situation is held by the more important Ruling Princes.

Assuming their accession, the Federal Legislature will consist of two Chambers: the Upper (Council of State) containing 260 members—104 representing the States and 156 elected on a high franchise to represent British India; the Lower Chamber (Federal Assembly) containing 250 members elected by the Provincial Legislature of British India, and 125 State representatives. The Executive will be vested in the Governor-General, as representing the King-Emperor, and he will act generally on the advice of a Council of Ministers responsible to the Legislature. Certain departments, however—Foreign Affairs and Defence—the Viceroy will administer through Ministers personally and exclusively responsible to himself, and in certain other matters he may act otherwise than on the advice of his 'Responsible' Ministers.

The machinery of the Central Government is (save for the Federal element) reproduced in the autonomous Provinces: the Governor will, in certain spheres, act (like the Governor-General) on his own responsibility, but in most on that of Ministers responsible to the Legislature, which in six of the most important Provinces will be bi-cameral and in the rest uni-cameral.

The Act also provides for the creation of a Federal Court, whose chief function is to adjudicate in disputes between the autonomous Provinces, and also (when the Federal Constitution comes into existence) between the Indian States with one another or with the Federation. The Federal Court also possesses an appellate jurisdiction, being charged

to hear appeals from High Courts in British India. An appeal will, however, lie as of right in all cases to the Privy Council. The Court has also certain advisory functions in regard to the interpretation of Statutes. The Federal Court inaugurated in December 1937 has begun to function under its first Chief Justice, Sir Maurice Gwyer, an English lawyer of varied experience and great distinction.

For the rest, the Act is not yet in full operation. The new provincial Government and Legislatures came into being in the same year. But not without a serious hitch. In seven out of the eleven Provinces, including Bombay, Madras, and the United Provinces, the Congress Party obtained majorities and the Governors called upon the majorities to assume office. They refused to form Ministries unless the Governors pledged themselves not to use the special powers conferred upon them by the Constitution. A deadlock ensued; and, though it has been temporarily resolved, it is only too likely to recur with Ministries belonging to a Party pledged to work for the complete severance of the British connexion. Experience of office may modify their more extreme views, though the Congress, a rival and unofficial Representative body, is a power with which it would be folly not to reckon.

The more important part of the Act of 1935 has not yet (1938) come into being. It depends, as already indicated, on the willingness of the Princes to come into the Federation.

Very great pressure has been put upon them to induce them to do so at the earliest possible moment. But in each case the Instrument of Accession is to be a matter of individual negotiation between the Indian Ruler and the Crown. That is not the only obstacle. If many of the Rulers are mistrustful of Federation, so also is the Congress Party. The Indian Congress dreads the prospect of being faced in the Federal Legislation by powerful blocks of what it derisively describes as 'Palace Nominees'. Accordingly, it

insists, as a condition precedent alike to its own consent to Federation and to the admission of the States, that the latter should democratize their own Constitutions. The States are at present for the most part autocracies, some of them benevolent, some of them the reverse. If the wishes of the Congress Party prevail they must all consent to 'approximate to the Provinces in the establishment of responsible government, civil liberties, and method of election to the Federal House'.

It is safe to assume that the Government of India will offer every encouragement to the recalcitrant States to fulfil the conditions imposed by the Congress. For the moment, however, the Constitution of 1935 remains a torso.

§ X. THE DOMINIONS.

The changes effected since 1925 in the Constitutional position of the self-governing Dominions have been, if less fundamental, not less significant than the revolution initiated in India.

Troubles, political and financial, overtook our oldest colony, Newfoundland, in 1932, and in 1933 the Dominion requested the Imperial Government to send out a Royal Commission to investigate the position. As a result, Newfoundland was in 1934 temporarily reduced to the status of a Crown Colony; the Government was vested in a Governor, assisted by six Commissioners (three of whom were specially sent out from England), and the Colony was saved from imminent bankruptcy by a 3-per-cent. loan guaranteed by the Imperial Government. Since then, recovery, though not rapid, has been steady, and is likely to be assisted by the development, with the aid of British capital, of the paper-making industry.

The status of Malta was also reduced. Having formerly been self-governing, though not a 'Dominion', the government has since 1932 been vested in a Governor and an

Executive Council of eight members. Cyprus, which was formally annexed to the British Empire in 1914, was the scene of serious disturbances in 1931 and was in consequence deprived of its (mainly elected) Legislative Council. Southern Rhodesia was, on the contrary, endowed in 1923 with Responsible Government, and though it has not yet been promoted to 'Dominion Status' (whatever that undefined description implies) it possesses all the attributes of a Dominion, and is, in fact, administered not by the Colonial Office but by the Office set up in 1925 to deal with Dominion affairs. Accordingly, Southern Rhodesia finds itself, in this respect, in the august company of the Dominion of Canada, the Commonwealth of Australia, the Union of South Africa, and the Irish Free State. It was not, however, included in the enumeration set forth in the Statute of Westminster, which contains the nearest approach to a definition (if only *per enumerationem*) of Dominion Status to be found in British Constitutional Law.

Whether the Irish Free State should properly be included in that category is one of the many uncertainties attaching to its present position. Having declined the invitation to the Imperial Conference in 1937, Southern Ireland would appear to be excluded by its own act—not an isolated act—from the British Commonwealth of Nations. The whole position in Southern Ireland is, indeed, too anomalous and confused to make it worth while, at the moment, to attempt to define with greater precision the constitutional relations between that country and the British Crown and Empire.

It is not easy for the chronicler to see contemporary events in true historical perspective. Yet it is safe to say that few things affecting the British Constitution have happened since 1925 comparable in importance with the change in the relations between the Overseas Dominions on the one hand and the Imperial Crown and Imperial Parliament on the

other. Those changes were first announced in the Report of the Imperial Conference of 1926 and, with certain consequential amendments of the law, were partially embodied in the Statute of Westminster of 1931.

The Imperial Conference is neither a legislative nor an executive body. Nevertheless, it has come to occupy, in the absence of any other body to which such functions are, for the Empire as a whole, legally assigned, an exceedingly important place in the Imperial Economy.

The Imperial Conference of 1926 met at a moment when the current was running strongly towards disintegration. The influence of South Africa and Southern Ireland upon its deliberations was stronger than it ought to have been. But in Canada also the conduct of British diplomacy since the War had given some cause for dissatisfaction; moreover, Canada's demand for separate diplomatic representation in foreign capitals, and the circumstances attendant upon the conclusion of the Halibut Treaty of 1923, had revealed a new temper in Canadian politics.

Consequently, it was deemed advisable at the Conference of 1926 to devise a formula more precisely descriptive of the Constitutional relations of Great Britain and the Dominions than anything which had previously been reduced to writing. Fortunately the Conference could command the service of Mr. (the Earl of) Balfour, and to his acute brain and ingenious pen the drafting of the essential parts of the Report was due.[1]

The Conference declined the task of 'attempting to lay down a Constitution for the British Empire': nothing was to be gained by it. The Report proceeded:

'There is, however, one most important element in it,

[1] For more detailed treatment of the subject summarily treated in the following paragraphs reference may be made to Marriott: *Modern England*, pp. 466–8 (Methuen, 1934), and to Marriott, *This Realm of England*, c. xxvi (Blackie, 1938).

which from a strictly Constitutional point of view has now, as regards all vital matters reached its full development—we refer to the group of self-governing communities composed of Great Britain and the Dominions. Their position and mutual relation may be readily defined. *They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations.* . . . Equality of status, so far as Britain and the Dominions are concerned, is thus the root principle governing our inter-Imperial relations. . . .

'But the principles of equality and similarity, appropriate to *status*, do not universally extend to function. Here we require something more than immutable dogmas.'

Of the specific recommendations of the Report, the first concerns the Royal title, which was, by an Act passed in 1927, amended to run as follows: 'George V, by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India.'

The Report next proceeds to deal with the position of the Governors-General:

'In our opinion,' it runs, it 'is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any department of that Government. It seemed to us to follow that the practice whereby the Governor-General is the formal official channel of communication between His Majesty's Government in Great Britain and his Governments in the Dominions might be regarded as no longer wholly in accordance with the constitutional

position of the Governor-General. It was thought that the recognised official channel of communication should be, in future, between Government and Government direct.'

If, however, the Governor-General of a Dominion was no longer to be the representative, agent, or nominee of His Majesty's Government in Great Britain, on whose advice was the Constitutional King to act in appointing him? That question was answered as regards Australia by the following announcement issued, on December 2, 1930, not from Downing Street but from Australia House: 'His Majesty the King, on the recommendation of the Right Hon. J. H. Scullin, Prime Minister of Australia, has appointed the Right Hon. Sir Isaac Alfred Isaacs to the office of Governor-General for the Commonwealth of Australia.' This announcement strikingly illustrated the Constitutional change effected by a mere resolution of the Imperial Conference—a body devoid of legislative competence. An Australian paper described the incident as an 'opportunity to sever the nexus with the British Government'.

The opportunity, happily, was not taken. But the precedent set by Mr. Scullin—a precedent not likely to be followed in Australia—was followed by General Hertzog, Prime Minister of the Union of South Africa, who in 1936 recommended the appointment as Governor-General of Mr. (Sir) Patrick Duncan.

The next matters with which the Report dealt were connected with the operation of Dominion legislation: in particular, His Majesty's 'powers of disallowance' of the enactments of Dominion legislation; the reservation of Dominion legislation for the signification of His Majesty's pleasure; and the legislative competence of the Imperial Parliament ('the Parliament at Westminster', as the Report significantly termed it) and the Dominion Parliaments respectively. The Conference wisely concluded in reference to these matters that 'the issues involved were so complex

that it would be necessary to obtain expert guidance as a preliminary to further consideration by His Majesty's Governments in Great Britain and the Dominions'.

That expert guidance was obtained from a Conference specially convened in 1929 and consisting mainly of lawyers and permanent officials from the United Kingdom and the Dominions.

The Committee of Experts made certain recommendations[1] which formed the basis of the Statute of Westminster, enacted in 1931.

In regard to 'disallowance', or the right of the Crown, on the advice of Ministers of the United Kingdom to annul an Act passed by a Dominion Legislature the Conference agreed that it could no longer be exercised, although for certain technical reasons the specific abolition of the right seemed not to be advisable. Consequently the Statute of Westminster contains no direct reference to this right, or to the power hitherto exercised by Colonial Governors of 'reserving' assent to Bills passed by their several Legislatures until they should have consulted and received instructions from Whitehall.

Much more difficult and obscure, and at the same time more practically important, was the problem of extra-territorial legislation. In this matter the Statute of Westminster, following the cautious and non-committal recommendation of the Report, simply 'declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation' (section 3).

The Statute (by sections 5 and 6) removed all doubts as to the unfettered power of a Dominion Legislature to make laws in relation to Merchant Shipping, and also repealed, though only as regards future enactments, the Colonial Laws Validity Act of 1865. That Act affirmed the principle that an Act of a Colonial Legislature was not void, although

[1] Cmd. 3479.

repugnant to the Law of England, *unless it contravened an Act of the Imperial Parliament made directly* applicable to the Colonies in question. The italicized words were held to impair equality of status affirmed by the Statute of Westminster. The Act was, therefore, repealed.

Equality was even more specifically affirmed by the repudiation of the right of the Imperial Parliament to legislate for a Dominion 'otherwise than at the request and with the consent of that Dominion (Preamble and section 4). But the Expert Conference of 1929 was not allowed to forget, and the Imperial Conference of 1930 reminded Whitehall, that there are self-governing States in the Commonwealth of Australia, and that even the Canadian Provinces have rights which cannot be ignored. The rights of these units as well as those of New Zealand were accordingly safeguarded by sections 7, 8, and 9 of the Act.[1]

The question may well be asked: 'What remnant of Imperial unity survives the Act of 1931?' The answer may be found in the Preamble to the Statute. It runs thus:

> 'Inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom.'

The Crown, then, is the only legal link that binds together the several nations of the British Commonwealth. Will it hold? That link has already snapped once. It snapped

[1] The question has been raised whether State and Provincial Rights were effectually safeguarded. Western Australia in 1935 had reason to think not. But the problem of the Relations of the Federal Governments and their Component States is an exceedingly difficult one which is already (1938) causing trouble in Canada, and may cause it elsewhere.

when in 1776 the English Colonies in North America attempted to distinguish between 'a common Executive Sovereign' whose prerogative was acknowledged in each of the seceding Colonies and the Imperial Parliament whose jurisdiction they repudiated. Moreover, it is essential to bear in mind that the symbolic Crown is worn by a Constitutional King who is advised by responsible Ministers. What if the advice tendered by his Ministers in Pretoria contradicts the advice given by his Ministers in Ottawa, or the advice given at Canberra involves executive action at variance with advice given by Downing Street. Take the vital question as to the right of secession. The skilful phrasing of the paragraph in the Preamble 'neither affirms nor denies', as Dr. Jenks has pointed out, 'the disputed right of secession.'[1] But what if South African Ministers were to advise in favour of, and Downing Street against, secession?

Apart from that particular and vital issue it is evident that a single Executive responsible to half-a-dozen different Legislatures must involve a condition of very unstable equilibrium. The hope was that the strength of the structure thus precariously erected might not be brought to the test. To a peculiarly rigorous test it was, in fact, subjected in December 1936. The result will be presently disclosed.

Meanwhile, the economic condition of the world after the War induced an effort to strengthen the ties provided by inter-imperial trade. It was hoped that the weakening of the Constitutional links might thus be in some measure counteracted.

The principle of Imperial Preference, already accepted by the Dominions, was reaffirmed by the Conference of 1917 and 1918. By the Finance Act of 1919 introduced appropriately by Mr. (Sir) Austen Chamberlain, the principle was at long last incorporated in the fiscal system of Great Britain.

[1] *Quarterly Review*, July 1932.

It was carried farther in the Safeguarding of Industries Act of 1921, and two years later a special Imperial Conference was summoned to deal with that matter and with the closely related subject of Empire Settlement, which it was hoped to encourage by an Act passed in 1922. The hope, unhappily, was not fulfilled.

The policy of Preference also suffered a set-back in 1924, and again in 1929, owing to the electoral misfortunes of the Conservative Party. But the financial crisis of 1931 brought a National Government into power, and with general approval it carried through a fiscal revolution which entirely reversed the Free Trade policy pursued by Great Britain since 1846.

In 1932 an Imperial Trade Conference met at Ottawa, and a series of agreements was negotiated which gave a considerable if insufficient impetus to inter-Imperial trade. The fear that any gain to Imperial trade would be secured at the loss of foreign trade has, in the meantime, been effectually dispelled. 'Opponents of the Ottawa Agreements, and of the policy upon which they are based, are', wrote *The Times*, 'accustomed to denounce them as advantageous perhaps to our own economic interests, but certainly detrimental to those of other countries and thus an obstacle to economic appeasement. Their case is fanciful and cannot stand up against the facts established by (Sir George Schuster's) analysis.'[1]

Centripetal tendencies in the sphere of trade may, then, it is hoped, counteract the centrifugal forces inherent in the Statute of Westminster, and the policy which it embodied.

It is, however, satisfactory to record that from the exacting test to which the new Imperial Structure was subjected in December 1936 it emerged without damage.

Nevertheless, it were the height of folly to minimize the gravity of the shock thus suffered by the Crown and the

[1] June 4, 1938, commenting upon two remarkable articles by Sir George Schuster in *The Times* for June 3 and 4, 1938.

Constitution. The shock was as sudden as it was severe. The nation and the Empire had but lately manifested their loyalty to the throne and their deep affection for its occupants, by the simple yet deeply impressive celebration of the Silver Jubilee of King George and Queen Mary. Further manifestations of affection were evoked by the death of the King in January 1936 and by the accession to the throne of a Prince of Wales who had endeared himself, as no other Prince had ever done before, to all classes of his future subjects in the insular Kingdom and throughout the Empire.

Before his Coronation, however, King Edward VIII announced his intention of contracting a marriage which his Ministers could not approve. By the King's wish the Dominions were consulted and were found to be in complete accord with His Majesty's responsible advisers in the United Kingdom.

The King then executed an Instrument of Abdication; a Bill giving effect to it was immediately introduced into the Imperial Parliament; the Dominions of Canada, Australia, New Zealand, and South Africa 'pursuant to section 4 of the Statute of Westminster, assented to its enactment; it became law throughout the Empire. Edward VIII ceased to reign; and at the same moment George VI became King.

Plans had already been matured for giving to the Coronation of Edward VIII a special Imperial significance. Those plans were carried out, under circumstances which added peculiar solemnity to the occasion, at the Coronation of King George VI and Queen Elizabeth. All the Prime Ministers of the great Dominions attended it, not merely as honoured guests, but as of equal status with the Prime Minister of the United Kingdom. Moreover, the Coronation Oath itself was amended to accord with the new Imperial Constitution embodied in the Statute of Westminster.

'The importance of the Crown in our Constitution is not a diminishing but an increasing factor. It increases and

must increase with the development of those free self-governing communities beyond the sea who are constitutionally linked to us through the person of the Sovereign, the living Symbol of Imperial Unity.' Thus spake Mr. Balfour, on the death of Queen Victoria in 1901. His prediction has been precisely fulfilled.

CHAPTER I

THE CLASSIFICATION OF CONSTITUTIONS

'Consider what nation it is whereof ye are—a nation not beneath the reach of any point the highest that human capacity can soar to.'—MILTON.

'The difference of Commonwealths consisteth in the difference of the Sovereign, or the person representative of all and every one of the multitude. . . . When the representative is one man, then is the Commonwealth a Monarchy; when an assembly of all that will come together, then it is a Democracy or popular Commonwealth; when an assembly of a part only, then it is called an Aristocracy. Other kinds of Commonwealth there can be none; for either one or more or all must have the Sovereign power entire.'—HOBBES, *Leviathan*.

To the study of English Institutions there are many methods of approach. Of these the most obviously contrasted are the antiquarian and the political; we may begin either with the *Germania* of Tacitus and the *Dooms* of Ethelbert, or with Bagehot's *English Constitution* and the Reform Acts of 1832, 1867, and 1884.

It is desirable, therefore, to explain at the outset the scope, method, and purpose of the chapters that follow.

I propose to attempt a brief description of the actual working of the Constitution of the United Kingdom and of the British Empire; to sketch the historical development of the various organs of Government—the Executive, the Legislature, the Judiciary; to analyse the machinery and discuss the functions of Local Government; and to define the constitutional relations of the Mother Country and her Colonial dominions and dependencies.

Two preliminary questions present themselves. First: What is a Constitution? and, secondly: To what general category does the English Constitution belong? A 'Constitution' is defined by Austin as 'that which fixes the structure of the supreme Government'; by Sir George Cornewall Lewis as 'the arrangement and distribution of the Sovereign power in the Community, or the *form* of the Government'.

Provisionally accepting these definitions we next inquire· To what general category does the English Constitution belong? How are we to describe it, or classify it? According to the time-honoured basis of classification a Constitution must belong to one of three categories: it must be either a Monarchy, or an Aristocracy, or a Democracy; Sovereignty must be vested either in one person, or in the 'few' or in the 'many'. To this merely quantitative classification Aristotle, to whom the terminology of Political Science owes so much, added a qualitative or ethical differentia. He begins, it is true, by accepting the merely numerical differentia by which Governments are discriminated according to the *number* of the rulers; the one, the few, or the many. But this does not satisfy him. Almost immediately he corrects the numerical by an ethical standard. The 'one' may rule either for the common good, or for his own selfish advantage: in the former case the Government is a *Kingship* or *Monarchy*, in the latter a *Tyranny*. Similarly, the Government of the 'few' may be either an *Aristocracy* or an *Oligarchy*; and that of the 'many' may be either a *Polity* or a *Democracy*. Thus we obtain a twofold classification: (1) normal Constitutions (ὀρθαί); and (2) deviation-forms, perversions, or corruptions (παρεκβάσεις). Tyranny is the perversion of Kingship, Oligarchy of Aristocracy, and Democracy of Polity. But even this does not satisfy Aristotle's analytical mind.

Democracy is commonly defined as a Constitution in

which the masses are supreme; Oligarchy as one in which the Few are supreme. But how are we to describe a Constitution in which the rich ruling in the interest of the rich are in a majority; is that a Democracy or an Oligarchy? How are we to classify one in which the poor ruling in the interest of the poor form a minority? In a word, is the distinction to be quantitative or qualitative? Is it to be based on the question of numbers or of wealth? After prolonged discussion Aristotle decides that the question of numbers is accidental, that of wealth is essential. Hence Oligarchy is the rule of the rich, ruling in the interests of the rich, be they few or many. Democracy is the rule of the poor, be they many or few, ruling in the interests of the poor. Nor can it be doubted that in this insistence on the qualitative element Aristotle was pointing to a truth of real importance.

'The principle of classification adopted by Plato and Aristotle has the merit', as Mr. Newman, at once the most subtle and the most profound of Aristotelian commentators has pointed out, 'of directing attention to the ἦθος and aim of constitutions as distinguished from their letter: we learn from it to read the character of a State, not in the number of its rulers, but in its dominant principle, in the attribute—be it wealth, birth, virtue, or numbers, or a combination of two or more of these—to which it awards supreme authority, and ultimately in the structure of its social system and the mutual relation of its various social elements. If they erred in their principle of classification, it was from a wish to get to the heart of the matter.'[1]

A modern critic may perhaps regard Aristotle as tiresomely insistent on this question of classification of Constitutions. But two things must be borne in mind. First: that to the Greeks the Constitution was in very truth the soul of the State; everything depended on it;

[1] Newman, *Politics*, i. 225.

not merely public well-being but individual morality; not merely the Government of the State, but the daily life of the citizen. Only in the Ideal State, that is in the State with a perfect Constitution, could public and private morality coincide: there only was the 'good man' identical with the 'good citizen'. 'In the vaster States of to-day,' once more to quote Mr. Newman, 'opinion and manners are slower to reflect the tendency of the Constitution: in the small city States of ancient Greece they readily took its colour. It was thus that in the view of the Greeks every Constitution had an accompanying ἦθος, which made itself felt in all the relations of life. Each constitutional form exercised a moulding influence on virtue: the good citizen was a different being in an Oligarchy, a Democracy, and an Aristocracy. Each Constitution embodied a scheme of life, and tended, consciously or not, to bring the lives of those living under it into harmony with its particular scheme.'

To the citizen of a modern State these are 'hard sayings', and I dwell upon them only for an instant, partly to point a moral, but mainly to suggest a contrast.

I pass on to notice the permanent influence of Aristotle upon the terminology of Political Science. We cannot get away from him if we would. 'Monarchy', 'Aristocracy', 'Democracy'—the classification dogs us through the whole history of political speculation. The philosophers of the Middle Ages, despite Christian influences, were completely under the spell. Thomas Aquinas, for example, is no less typical and representative of the Middle Age than is Aristotle of the ancient Greek world. In the *De Regimine Principum*, 'the most popular and next to the *Politics* of Aristotle the most authoritative political handbook of the Middle Ages,'[1] we have the same already time-honoured basis of classification. It is true that in the two last Books of the *De Regi-*

[1] Plummer, *Fortescue's Governance of England*, p. 171.

mine—generally regarded as spurious[1]—Constitutions are classified as follows:—(1) *Dominium Sacerdotale et Regale*, e.g. the Papacy; (2) *Dominium Regale Tantum* or absolute Monarchy; and (3) *Dominium Regale et Politicum* or 'limited' Monarchy. For English students this latter classification, whether it is to be attributed to Aquinas or to a later hand, has a special interest and significance. It is closely followed by the great English publicist of the fifteenth century, Sir John Fortescue. Thus in the *De Laudibus Legum Angliae* Fortescue writes: 'A King of England cannot at his pleasure make any alterations in the laws of the land, for the nature of his Government is not only *regal but political*.' Fortescue almost verbally anticipates the language of Hooker—writing in the last years of Queen Elizabeth, and from Hooker it is in every sense an easy transition to the great name of Thomas Hobbes of Malmesbury. Hobbes —the most severely logical of all English philosophers— declares boldly and unequivocally for the simple numerical differentia.

'The difference of Commonwealths consisteth in the difference of the Soveraign or the Person representative of all and everyone of the multitude. And because the Sovereignty is either in one Man, or in an assembly of more than one; and into that assembly either Every man hath right to enter, or not everyone, but Certain men distinguished from the rest; it is manifest there can be but Three kinds of Commonwealth. For the Representative must needs be One man or more; and if more then it is the Assembly of all, or but of a part. When the Representative is one man then is the Commonwealth a Monarchy; when an assembly of all that will come together, then it is a Democracy or Popular Commonwealth: when an Assembly of a part only, then it is called an Aristocracy. Other kind of Commonwealth there can be none: for either One or more or all must have the Sovereign power (which I have shown to be indivisible) entire.' Of the deviation forms or perversions, or other varieties Hobbes will have none.

[1] Franc, *Publicistes de l'Europe*.

'They are not the names of other forms of Government, but of the same formes *misliked*. For they that are discontented under Monarchy call it Tyranny; and they that are displeased with Aristocracy call it Oligarchy; so also they which find themselves grieved under a Democracy call it Anarchy (which signifies want of Government): and yet I think' (he adds) 'no man believes that want of Government is any new kind of Government; nor by the same reason ought they to believe that the Government is of one kind when they like it and another when they dislike it, or are oppressed by the Governors.' Other supposed varieties of the three normal forms are really due to loose thinking and confusion, e.g. Elective Monarchy or Limited Monarchies. But an elected King, if he has the right to appoint a successor, is really hereditary; if he has *not* the right he is not Sovereign. Sovereignty really resides with those who have the right to elect the Successor. Similarly in regard to so-called 'limited Monarchy', the Sovereignty resides not in the Monarchy, but in the Assembly, be it democratic or aristocratic, which imposes the limitation. Hobbes, therefore, agrees with Rousseau that though power may be delegated Sovereignty is indivisible; and irresponsible—except in one particular. One quasi-limitation he does admit. The Sovereign must defer to the law of nature, that is, he must fulfil the purpose for which the State exists, and provide for the peace and security of the people.

'The difference between these three kinds of Commonwealth consisteth not in the difference of Power, but in the difference of Convenience or aptitude to produce the peace and security of the people; for which end they were instituted.'[1]

No subsequent English writer has materially modified the severe analysis of Hobbes except Sir John Seeley. The value of Seeley's constructive contribution is perhaps open to question, but at least he had the merit of perceiving that the accepted classification, 'suggested originally by the very partial and peculiar experience of the Greek philosophers,' was hopelessly inadequate and inapplicable to the conditions of the modern world.

[1] *Leviathan*, c. xix.

To divide the great States of to-day into Monarchies, Aristocracies, and Democracies would obviously not carry us very far, even if the classification commanded universal assent. But does it? To which of the three categories must we assign the Government of England? The books evade the difficulty by describing the English Constitution as 'mixed', and there, for the moment, we will leave it Germany, it may be assumed, would be described as a Monarchy; France and the United States as Democracies. But it is obvious, on anything more than the most superficial scrutiny, that there is far more in common between Germany and the United States than between the United States and France; more in common, again, between Monarchical England and Republican France than between England and Russia; more in common, once more, between the German Imperial Monarchy and the Swiss Republic than between the neighbouring Republics of France and Switzerland. These few instances, which might of course be indefinitely multiplied, suggest the conclusion that we must discover a new basis of classification. They do more; they indicate the direction in which we should seek it. Confining our attention, for the present, to a few of the more conspicuous States of the modern world, France, Russia, Spain, Italy, Germany, Austria-Hungary, Switzerland, and the United States of America, it will be at once apparent that, on one intelligible principle of division, they fall into two groups; the first four, differing *inter se*, have this in common: they are all Simple or Unitary States; the last four, similarly differing *inter se*, are all Complex, Composite, or Federal States.

Thus we obtain one basis of classification; we divide States into Unitary and Federal. To the former category we should assign, indisputably, France, Spain, Italy, Russia, Holland, Belgium, Portugal, Greece, Sweden, Norway, and Denmark; to the latter, Germany, Austria

Hungary, Switzerland, the United States, the Canadian Dominion, and the Australian Commonwealth. To which category does Great Britain itself belong? At first sight Great Britain, with its 'Imperial' Parliament, with the statutory and subordinate Legislatures in Canada, Australia, New Zealand, South Africa, and elsewhere, with its vast network of Crown Colonies and Dependencies, would seem to belong to the *federal*, not the *unitary* group, and the time may come when it will. But the time is not yet, or, rather, it is no longer. In the past England and even Great Britain would have been accurately classified as a Composite State. Between 1603 and 1707 England and Scotland, between 1714 and 1837 Great Britain and Hanover, were united in a 'personal union'—comparable with but less intimate than the union between Austria and Hungary to-day. Between 1782 and 1800 there were in Great Britain and Ireland two Parliaments—nominally co-ordinate—and united only by the connecting link of a common Monarchy. But since 1801 there has been no independent Legislature in the British Empire; and this must be regarded as the ultimate and discriminating test. Legislative Sovereignty, as I propose to show later, is vested for the whole British Empire in the 'Imperial' Parliament, i. e. in King, Lords, and Commons sitting at Westminster. It must be understood, of course, that I now speak, not of practical working, but of legal form.[1] The British Empire is, therefore, technically a 'unitary State'. Parenthetically it should be observed that of the 'Composite' State there are many forms, varying from loose 'personal union' such as that which subsisted between England and Scotland, 1603–1707, or that between Sweden and Norway, 1814–1905, to the Confederation (Staatenbund), of which Germany from 1815–66

[1] For the actual relations of the Mother Country and the Colonies, see *infra*, chapter xv.

may be taken as a type, and finally to the closely compacted Federal State (Bundestaat), of which we have examples in the modern German Empire and the United States.

We conclude, then, that taking the Composite and Unitary principles as our first and perhaps most fundamental differentia, England, and indeed the British Empire, must be assigned formally to the latter category.

A second basis of classification may be found in the character of the Constitution itself. Constitutions may be distinguished as *Rigid* and *Flexible*. A *Rigid* Constitution is one which can be altered and amended only by the employment of some special, and extraordinary, and prescribed machinery, distinct from the machinery of ordinary legislation. A *Flexible* Constitution is one in which amendment takes place by the ordinary process of law-making—and indeed of administration; in which there is no formal distinction between 'constitutional' and ordinary laws: between (as Cromwell put it) 'fundamentals' and 'circumstantials'.[1] In other words, Constitutions are differentiated by the position, authority, and functions of the Legislature. Under *rigid* Constitutions its function is merely *legislative*—to make laws under the limitations of the *Constitution*; under flexible Constitutions its function is not only legislative but *constituent*; not only to enact, to amend, and repeal laws, but to make and modify the Constitution.

At the opposite poles, in this respect, stand the Constitu-

[1] 'It is true, as there are some things in the Establishment which are Fundamental, so there are others which are not, but are Circumstantial. Of these no question but I shall easily agree to vary, to leave out, "according" as I shall be convinced by reason. But some things are Fundamentals! About which I shall deal plainly with you: these may *not* be parted with; but will, I trust, be delivered over to Posterity, as the fruits of our blood and travail. The Government by a single person and a Parliament is a Fundamental! It is the *esse*, it is constitutive . . . In every Government there must be somewhat Fundamental, somewhat like a *Magna Carta*, which should be standing, be unalterable' (Cromwell: Second speech to first Protectorate Parliament, Sept. 12, 1654.)

tions of England and America.[1] In England we know no distinction between 'constitutional' or 'fundamental' and 'ordinary' laws. Cromwell and the Constitution-makers of the Commonwealth attempted indeed to draw such a distinction, but the attempt was stoutly resisted even by the Protectorate Parliaments. These Parliaments, despite threats and cajolery, clung obstinately to their privileges as constituent and not merely legislative assemblies, and the result is that since the Restoration no attempt has ever been made to question the constituent authority of the English Parliament. The classical passage on this subject is in Blackstone's *Commentaries*[2]:—

'The power and jurisdiction of Parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court, he adds, it may be fairly said, "*Si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima.*" It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms.'

Professor Dicey's illuminating study on the *Law of the Constitution* is in large part an extended commentary on the same text.[3] Thus, in England, the Legislature is *Sovereign.* There is no superior authority by which it can be called to account.

In America it is otherwise. The Federal Legislature has

[1] Purists will I trust forgive the use, in a general way, of 'England' for the cumbrous 'Great Britain and Ireland'. American readers will, I am sure, pardon me for the use of 'America' where strictness would demand the 'United States of America'.

[2] i. 160.

[3] *Law of the Constitution*, by A. V. Dicey. London, 1885, and many subsequent editions.

no power to amend or alter the Constitution, and even in its ordinary legislation it works with the fear of the judicial decisions of the Supreme Court for ever before its eyes. For the Court is not only, as in England, the interpreter of the law, but the interpreter of the Constitution.[1] It has to decide not merely whether a given law is or is not applicable to a given case but whether the law itself is legal; whether, in fact, the Legislature did or did not exceed its constitutional powers in its enactment. I am not, for the moment, concerned to insist upon the enormous power thus conferred upon the Judiciary; that is a point which will engage our attention later on.[2] My immediate object is to contrast the unlimited competence of the Sovereign Legislature of England with the strictly limited authority of the non-Sovereign Legislature of the great Federal Republic of the West. In order to procure an amendment of the American Constitution it is necessary to put in operation the most elaborate machinery. Article V of the Federal Constitution declares:

'The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress, provided that no amendments which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.'

It will be observed, therefore, that no amendment can be even proposed without the assent of a two-thirds majority of

[1] For precise sense of this phrase cf. *infra*, pp. 292–3. [2] Chapter xii.

both Houses of the Federal Legislature, or, alternatively, of two-thirds of the several States; and that such amendment must, in its approved form, be ratified by three-fourths of the constituent States. Under these circumstances it is not surprising to learn that for sixty years (1804–64) there was no amendment at all in the Federal Constitution, and that only fifteen amendments in all were carried during the first hundred years of its existence. No one, therefore, will dispute the assertion of a distinguished American publicist[1] that there is no Constitution in Europe so difficult of amendment as that of America.

Conversely there is no other European Constitution so easy of amendment as that of England. Under the English Constitution there would be no greater difficulty, in a formal and legal sense, in decreeing the abolition of the House of Lords or the House of Commons, than in procuring an Act for the construction of a tramway between Oxford and Reading.

In respect to the machinery for constitutional amendment, most Constitutions occupy a position midway between that of England and that of America. In France, for example, revision must be demanded by both Houses. When their assent has been procured, the particular amendment must be submitted to the two Houses—the Senate and the Chamber of Deputies—in joint Session, acting as the 'National Assembly', and sitting for this special purpose not in Paris but at Versailles. For the carrying of such an amendment a simple majority suffices. In France, therefore, the process is not difficult or elaborate. In Sweden a constitutional amendment can be carried only after the interposition of a General Election. It must be proposed in one Riksdag and then submitted to the next. This amounts almost to a Referendum—a submission of constitutional amendment to the judgement of the constituencies. A similar rule obtains

[1] Mr. Woodrow Wilson.

in Norway. In Switzerland the Referendum is actually in force. No change can be adopted without the directly ascertained assent of the electors. In the German Empire the machinery for constitutional legislation is the same as for ordinary legislation. But there are two significant safeguards. (1) No State can be deprived of any right guaranteed to it by the Constitution, except with its own consent; and (2) Fourteen negative votes in the Federal Council (Bundesrath) suffice to defeat any constitutional amendment. The significance of this precaution is apparent when it is remembered that Prussia alone commands fifteen votes[1] in the Bundesrath; and Bavaria, Saxony, and Würtemberg fourteen between them. Thus any constitutional amendment can be defeated either by Prussia alone, or by a combination between the middle States, or by a combination between the small States.

One of the most recent, and to Anglo-Saxons one of the most interesting Constitutions of the modern world contains very elaborate provision for constitutional amendment. Under the Australian Commonwealth Act[2] any proposed amendment must (1) pass both Houses of the Federal Legislature by an absolute majority, or must pass one House twice after an interval of three months; (2) obtain the assent of the people, expressed by means of a Referendum, in a majority of the constituent States; (3) be approved by a majority of the voters who cast their votes, in the Commonwealth as a whole. And even under these precautions, the federal representation of the several States, may not be altered except by the States concerned.

While, therefore, there is no Constitution quite so 'rigid' as that of the United States,[3] there is none so entirely

[1] Having purchased Waldeck.

[2] 63 & 64 Vict. c. xii.

[3] With the possible exception of that of the Australian Commonwealth.

'flexible' as that of the United Kingdom. One word of caution must however here be interposed. I refer, of course, to legal 'rigidity' and 'elasticity'. President Lowell has lately warned us that the distinction between 'elasticity' and 'rigidity' has lost something of its practical importance owing partly to the increasing variety in written Constitutions and partly to the decreasing rigidity of rigid Constitutions.[1] Even in America the Law of the Constitution has been supplemented and modified by numberless constitutional conventions. The distinction may in practice have become less important than it was. None the less I venture to maintain that it is still sufficiently important and sufficiently clear to afford a useful basis for the scientific classification of modern States.

It is, however, pertinent to observe that a 'rigid' Constitution is no longer—if it ever was—identical with a *written* Constitution. As a matter of fact a written Constitution is usually 'rigid' in the sense that it provides special machinery for its own amendment. But the rule is not invariable, least of all in Constitutions modelled on that of England. Thus the Italian *Statuto* 'contains no provision for amendment, it can be, and in fact has been altered by the ordinary process of legislation; and the same thing was true of the French Charter of 1830. The last Spanish Constitution omits all provision for amendment, but one may assume that if it lasts long enough to require amendment the changes will be made by ordinary legislative process.'[2]

Nevertheless the distinction between 'written' and 'unwritten' constitutions would in practice correspond so closely to that between 'rigid' and 'flexible' that it is not worth while to suggest it as a separate basis of classification.

A third differentia may be found in the position of the Executive and in particular the relation of the Executive to

[1] *The Government of England*, by A. Laurence Lowell, London, 1908, c. i.
[2] Lowell, i. 3.

the Legislature. The Executive may be either superior to, co-ordinate with, or subordinate to the Legislature. In all despotic monarchies the Executive is of course supreme; but having regard only to the typical and progressive States of the modern world we may ignore the first relation and consider those States only in which one of the two latter relations prevail. We may classify them respectively as the *Presidential* and the *Parliamentary*. In the United States, for example, and in the German Empire, Executive and Legislature are co-ordinate in authority; in France and in Great Britain, in the British Self-Governing Dominions, and in all the other States, too numerous to mention, in which the constitution has been consciously framed upon the English model, the Executive is, in theory at least, subordinated to the Legislature.[1] Whether in England, and possibly elsewhere, the Executive is not, in practice, rapidly encroaching upon the Legislature, and even, in effect, reducing the latter to a position of subordination, is a question which may properly engage our attention later on. For the moment I am concerned only with constitutional theory. From this point of view the German Empire may perhaps be regarded as being in a transitional state; in the position in which England found herself in the seventeenth century, when King and Parliament were contending hotly for the control of the Executive.

For this principle of ministerial responsibility Sir John Eliot had died in prison; for this principle John Pym was prepared to put all to the hazard of the sword. Charles I would have none of it. It is, he contended, 'the undoubted right of the Crown of England to call such persons to our Secret Counsels to public employment and our particular

[1] 'Subordination' is perhaps too strong a term in view of the fact, pointed out by Sir William Anson, that the Executive can dissolve the Legislature. The 'responsibility' of Executive to Legislature is in England, of course, unquestioned; but responsibility is not precisely the same thing as subordination.

Service as we shall think fit.' To deny this right 'were to debar us that natural liberty all freemen have'. This was in fact the essential point at issue in the great constitutional contest of the seventeenth century. It is the essential point at issue in the contest which seems to be impending in Germany.

The fathers of the Constitution of the United States deliberately decided against the principle embodied in the *Grand Remonstrance*; they decided, in fact, in favour of the Monarchical as against the Parliamentary principle.[1] Or rather, they preferred the practice of Cromwell to that of Walpole, and the theory of Montesquieu to either. Irresistibly attracted by the political philosophy of France, they adopted in its entirety Montesquieu's famous doctrine of the 'Division of Powers'. Legislative, Executive, and Judiciary, were to be strictly co-ordinate and absolutely distinct.[2]

The Constitutions which have been deliberately modelled upon our own have, on the other hand, naturally followed the English practice in this essential point. So strongly is this emphasized in the Self-Governing Colonies of the British Empire, in Canada, Australia, New Zealand, and the several South African Colonies, that they are actually known as 'responsible', from the central fact of the responsibility of the Executive to the Legislature. In France, Italy, Sweden, Norway, Austria, and Hungary, and in many other States, the same principle holds.

It is time to summarize the conclusions at which we seem to have arrived.

[1] The appointment of Cabinet Ministers is in theory subject to the approval of the Senate, but the approval is in practice never withheld, and the President's power of removal is absolute.

[2] I am not, of course, unmindful of the traditional view that the American Constitution was modelled upon the theory as opposed to the practice of the English Constitution, but I suggest what seems to me to be a juster view. It is not possible to argue, in this place, the point in detail.

We have seen that the classical and time-honoured basis of classification—the division of States into Monarchies, Aristocracies, and Democracies—will not carry us very far in the modern world. In its place, or perhaps in addition to it, we have found by an inductive process, three new differentiae, and we propose to assign the typical States of the modern world to three categories:—

1. Simple (Unitary) or Composite (Federal);
2. Rigid or Flexible;
3. Monarchical (Presidential) or Parliamentary.[1]

Accepting these as the essential differentia, we get a series of cross classifications as follows. The English Constitution is at once Unitary, Flexible, and Parliamentary; that of the United States: Federal, Rigid, and Presidential (Monarchical); that of France: Unitary, Rigid, and Parliamentary; that of Germany: Federal, Rigid, and Monarchical (or Presidential); that of Austria-Hungary: Composite (Personal Union), Flexible, and Parliamentary; those of Canada and Australia: Federal, Rigid, and Parliamentary.

With so much of preface, rendered necessary by the attempt to find a satisfactory basis of classification for the Constitutions of the modern world, I shall proceed, in the next chapter, to discuss the outstanding characteristics of our own Constitution.

[1] This, as is apparent from the next paragraph, is a 'cross' classification; but it may be well specifically to point out that Federal Constitutions are necessarily rigid.

CHAPTER II

THE SALIENT FEATURES OF THE ENGLISH CONSTITUTION

'En Angleterre la Constitution peut changer sans cesse; ou plutôt elle n'existe pas.'—TOCQUEVILLE.

'Many persons in whom familiarity has bred contempt, may think it a trivial observation that the British Constitution, if not (as some call it) a holy thing, is a thing unique and remarkable. A series of undesigned changes brought it to such a condition, that satisfaction and impatience, the two great sources of political conduct, were both reasonably gratified under it. For this condition it became, not metaphorically, but literally, the envy of the world, and the world took on all sides to copying it'.—SIR HENRY MAINE.

'Le gouvernement d'Angleterre est plus sage parce qu'il y a un corps qui l'examine continuellement, et qui s'examine continuellement lui-même: et telles sont ses erreurs, qu'elles ne sont jamais longues, et que par l'esprit d'attention qu'elles donnent à la nation, elles sont souvent utiles.'—MONTESQUIEU, *Grandeur et Décadence des Romains.*

OF all the characteristic features of the English Constitution there is none which strikes so oddly the imagination of foreign critics as the fact of perpetual and almost imperceptible modification. It was this which drew from Tocqueville the famous aphorism that in England 'there is no Constitution'. On the lips of a Frenchman, familiar with a long succession of written Constitutions, each self-contained, each complete and coherent, the remark is not merely intelligible but obvious. 'For eighty years,' says M. Boutmy, 'French History shows us under this name [Constitution] one single document conceived all at once, promulgated on a given day, and embodying all the rights of Government and all the guarantees of liberty in a series of connected

chapters.'[1] American publicists also, baffled in their investigations by the absence of a compact, accessible, and written 'Constitution', are apt to utter the same complaint. Being accustomed to an authoritative text on which to base their critical commentaries, they find themselves at sea when called upon to deal with a Constitution which rests partly indeed upon Statute Law, but more largely upon Common Law, and upon precedents, conventions, and understandings. This being the case, a foreigner may well be forgiven if he declares in his haste that in England the Constitution does not exist.

But the observation is only partially accurate. It is true that the process of modification is so rapid and so incessant that a commentator may find himself out of date between the composition of his work and its publication. For the Constitution undergoes perpetual change not only by process of positive legislation, but by the action of the Executive and by the decisions of the Judiciary. Precedents are daily created which may solidify into 'Conventions', hardly less potent than legislative enactments. Understood in this sense, Tocqueville was right in his assertion that in England the Constitution does not exist. It is indisputably difficult, at any given moment, to describe with scientific accuracy a Constitution which is in a state of perpetual flux. Such a Constitution M. Boutmy picturesquely compares to *un chemin qui marche*, or 'to a river whose moving surface glides away at one's feet, meandering in and out in endless curves, now seeming to disappear in a whirlpool, now almost lost to sight in the verdure.'[2]

But it is easy to overestimate the importance of the distinction which here and elsewhere is implicitly drawn between 'written' and 'unwritten' Constitutions. A large part of English Constitutional Law is based upon statutory

[1] Boutmy, *Studies in Constitutional Law*, p. 5.
[2] Ibid., p. 4.

enactments not less positive, though much less unalterable than the clauses of the American Constitution or even those of the French Constitution of 1875. To mention only a few. The relations of England and Scotland are defined by the Statute of 1707; those of Great Britain and Ireland by that of 1800. Personal liberty rests mainly upon the great Statute (the Habeas Corpus Act) of 1679. The prerogatives of the Crown are curtailed by the Great Charter of 1215, by the Petition of Right (1628), by the Bill of Rights (1689), and by the Act of Settlement (1700). The qualifications of Parliamentary Electors and the number and limits of the Parliamentary Constituencies are defined by Acts of 1832, 1867, 1884, and 1885. The existing system of Local Government rests upon the Statutes of 1835, 1888, and 1894. It is true that these Acts possess, in a technical sense, no superior validity to 'ordinary' laws. Enacted by the same process, they are equally liable to modification or repeal. It is, moreover, true that they cover only a small fragment of the whole ground. Even a complete collection or enumeration of the Statutes which may be termed 'Constitutional' would leave an inquirer in dense ignorance of the most important and characteristic feature of the English Constitution. Thus no research, however laborious, which was confined to legal texts would reveal the constitutional relations between the two Houses of the Legislature; or the relations between the Legislature and the Executive; or the position and functions of the Cabinet; or the relations between the Parliamentary chiefs of Departments and the permanent Civil Service; or the precise political functions of the Crown. This vagueness or reticence is at once the despair and the admiration of foreign publicists. At every turn they are baffled by the lack of authoritative texts. But they are candid enough to perceive and to emphasize the political advantages of the English method.

'The English', writes M. Boutmy, 'have left the different

parts of their Constitution just where the wave of History had deposited them; they have not attempted to bring them together, to classify or complete them, or to make a consistent and coherent whole. This scattered Constitution gives no hold to sifters of texts and seekers after difficulties. It need not fear critics anxious to point out an omission, or theorists ready to denounce an antinomy. . . . By this means only can you preserve the happy incoherences, the useful incongruities, the protecting contradictions which have such good reason for existing in institutions, viz. that they exist in the nature of things, and which, while they allow free play to all social forces, never allow any one of these forces room to work out of its allotted line, or to shake the foundations and walls of the whole fabric. This is the result which the English flatter themselves they have arrived at by the extraordinary dispersion of their constitutional texts, and they have always taken good care not to compromise the result in any way by attempting to form a code.'[1]

The English Constitution is, therefore, to a large extent an *Unwritten* Constitution; it is entirely a *Flexible* Constitution. The two characteristics, though obviously connected, are as we have already seen, by no means identical, and are not necessarily coexistent. In the majority of cases a written Constitution provides, and perhaps ought to provide, some special machinery for constitutional amendment. In others, as in those of Italy and Spain, this important matter is left to ordinary legislative process. But the English Constitution is undeniably and characteristically flexible. Not only is there a complete and conspicuous absence of any special machinery, but the process of change admittedly goes on almost imperceptibly. Submitted to scientific observation at considerable intervals of time, it is possible to perceive and to register certain changes in the balance of the various parts of the constitutional machine; but it is quite impossible to indicate with precision the moment at which the changes occurred. To take a single instance in illustration. Bagehot

[1] Boutmy, *Studies*, p. 7.

wrote his classical treatise on the English Constitution[1] in the closing years of the Palmerstonian era, on the eve of the Reform Act of 1867. Since that date many changes have been effected in the Constitution which are embodied in positive legislative enactments and which any diligent student can discover in the *Statutes*. In Parliamentary procedure also changes have occurred which are registered in Standing Orders, and may be learnt from manuals. But other changes have taken place which, though not less important, are far more subtle and elusive. One such change is to be found in the relations of the formal Executive to the formal Legislature, of the Cabinet to Parliament. Bagehot, writing in 1863, lays stress upon the subordination of the Executive to the Legislature. President Lowell,[2] in an analysis not less accurate and not less masterly than that of Bagehot but written forty years later, emphasizes the subordination of the Legislature to the Executive, especially in the domain of legislation. 'The programme of the ministers', he writes, 'must be accepted or rejected as a whole, and hence the power of initiative, both Legislative and Executive, must rest entirely with them. This is clearly the tendency in Parliament at the present day. The House of Commons is finding more and more difficulty in passing any effective vote, except a vote of censure. It tends to lose all powers except the power to criticize and the power to sentence to death.'[3] The change that has thus been effected in the balance of our constitutional machinery is obvious and undeniable, but it has been the result, not of formal resolution, still less of positive legislation, but of a gradual and imperceptible modification of usage.[4]

The English Constitution, then, belongs emphatically to

[1] Walter Bagehot, *The English Constitution*. London, 1863.

[2] A. L. Lowell, *The Government of England*, 2 vols. London, 1908.

[3] Lowell, i. 355.

[4] The point, used here simply for purposes of illustration, will be elaborated in Chapters iv and x.

the category of *Flexible* as opposed to *Rigid* Constitutions, and this characteristic feature is proved by several infallible tests. It possesses no special machinery for constitutional amendment; it draws no distinction between 'ordinary' and 'constitutional' laws, and it acknowledges, in the fullest sense, the doctrine of Parliamentary Sovereignty. But above all, as we have seen, observation proves conclusively that in the functions of the various organs of the body politic perpetual modification is, as a matter of fact, taking place.

This is not the place to discuss at length the advantages appertaining respectively to Rigid and Flexible Constitutions. Sir Henry Maine, writing with the fear of coming 'Democracy' before his eyes, praises and perhaps over-praises the precautions which certain typical Democracies have adopted against innovation:

> 'The powers and disabilities attached to the United States and to the several States by the Federal Constitution . . . have determined the whole course of American history. That history began, as all its records abundantly show, in a condition of society produced by war and revolution, which might have condemned the great Northern Republic to a fate not unlike that of her disorderly sisters in South America. But the provisions of the Constitution have acted on her like those dams and dykes which strike the eye of the traveller along the Rhine, controlling the course of a mighty river which begins amid mountain torrents, and turning it into one of the most equable water-ways in the world. The English Constitution, on the other hand, like the great river of England, may perhaps seem to the observer to be now-a-days always more or less in flood, owing to the crumbling of the banks and the water poured into it from millions of drain pipes.'[1]

Maine also insists, and rightly, on the 'legislative infertility' of Democracies, ancient and modern alike. 'There

[1] Maine, *Popular Government*, p. 245.

is no belief less warranted by actual experience than that a democratic republic is after the first and in the long run given to reforming legislation.' Maine's commendation may perhaps be discounted. Mr. Bryce, on the other hand, will not be suspected of any irrational resistance to reform, or of any anxiety to stand immovable in the ancient ways. But no man has borne more eloquent testimony to the advantages derived by the United States from the 'rigidity' of its Constitution:

'. . . . . The rigid Constitution of the United States has rendered, and renders now, inestimable services. It opposes obstacles to rash and hasty change. It secures time for deliberation. It forces the people to think seriously before they alter it or pardon a transgression of it. It makes legislatures and statesmen slow to over-pass their legal powers, slow even to propose measures which the Constitution seems to disapprove. It tends to render the inevitable process of modification gradual and tentative, the result of admitted and growing necessities rather than of restless impatience. It altogether prevents some changes which a temporary majority may clamour for, but which will have ceased to be demanded before the barriers interposed by the Constitution have been overcome. It does still more than this. It forms the mind and temper of the people. It trains them to habits of legality. It strengthens their conservative instincts, their sense of the value of stability and permanence in political arrangements. It makes them feel that to comprehend their supreme instrument of Government is a personal duty, incumbent on each one of them. It familiarizes them with, it attaches them by ties of pride and reverence to those fundamental truths on which the Constitution is based. These are enormous services to render to any free country. . . .'[1]

To such considerations great weight must be attached. But the fact should not be overlooked that the conservative tendencies exhibited by the United States and Switzerland may be otherwise explained. They are alike not merely in

[1] Bryce, *American Commonwealth*, i. 396.

their democratic but in their federal character. This is true also of the Australian Commonwealth, the rigidity of whose Constitution is second only to that of the United States. That the delicate equipoise of State and Federal rights should be liable to be upset by the ordinary, day by day, procedure of the Legislature would be deemed intolerable, alike by the people and by the constituent States.[1] Thus in a Federal State 'rigidity' is, in fact, a primary condition of existence.

In a Unitary State, on the other hand, it is far from being indispensable, and Flexible Constitutions possess in their turn at least one supreme advantage. They bend, but they do not break. Admitting easily, perhaps too easily, of reform, they are on that account the less susceptible to revolution. 'In France,' said Napoleon III, 'we make revolutions but not reforms.' In England we make reforms but not revolutions.

We are thus led by a natural transition to notice another feature of the English Constitution closely connected with that of flexibility; that of unbroken continuity. With characteristic insular disdain Arthur Young derided the efforts of the French legislators who sought to 'make' a Constitution 'as though a Constitution were a pudding to be made from a receipt'. In contradistinction to these 'made' Constitutions that of England has frequently been compared to an organism possessed of a capacity for constant and continuous growth. Biological analogies must not be pushed too far in Politics. But if the fact of continuity be a merit or advantage it cannot be denied to the English Constitution. Freeman insisted upon this feature with characteristic emphasis, but with unquestionable accuracy: 'The continued national life of the people, notwithstanding foreign conquests and internal revolutions, has remained unbroken for fourteen hundred years. At no moment has

[1] Cf. Sidgwick, *Elements of Politics*, c. xxvi. § 4.

the tie between the present and the past been wholly rent asunder; at no moment have Englishmen sat down to put together a wholly new Constitution, in obedience to some dazzling theory. Each step in our growth has been the natural consequence of some earlier step; each change in our Law and Constitution has been, not the bringing in of anything wholly new, but the development and improvement of something that was already old. Our progress has in some ages been faster, in others slower; at some moments we have seemed to stand still, or even to go back; but the great march of political development has never wholly stopped; it has never been permanently checked since the days when the coming of the Teutonic conquerors first began to change Britain into England.'[1]

Even our Revolutions have been proverbially conservative, and the primary anxiety of reformers has been to show that proposed innovations were in reality nothing but reversions to an earlier type. Nor, as a rule, has it been difficult to do so. 'By far the greatest portion of the written or statute laws of England consist', as Palgrave points out, 'of the declaration, the re-assertion, repetition, or the re-enactment, of some older law or laws, either customary or written, with additions or modifications. The new building has been raised upon the old ground-work: the institutions of one age have always been modelled and formed from those of the preceding, and their lineal descent has never been interrupted or disturbed.'

The point is one which demands no elaborate illustration. Nor is the explanation far to seek. National character has something to say to it; geographical situation has even more, and the peculiar genius of the Constitution has most of all. A good deal of scorn—only partially deserved—is sometimes poured upon 'national character' as the last resort of bankrupt criticism. But the thing exists,

[1] Freeman, *English Constitution*, p. 19.

and must unquestionably be counted among the factors that have gone to the moulding of the English Constitution, and particularly to the preservation of its continuity.

'The best instances of Flexible Constitutions', as Mr. Bryce has pointed out, 'have been those which grew up and lived on in nations of a conservative temper, nations which respected antiquity, which valued precedents, which liked to go on doing a thing in the way their fathers had done it before them. This type of national character is what enables the Flexible Constitution to develop; this supports and cherishes it. The very fact that the legal right to make extensive changes has long existed, and has not been abused, disposes an assembly to be cautious and moderate in the use of that right.'[1]

Again, the degree of our 'insularity' has been the subject of debate: but 'insular' we have been and are as compared with the nations of the Continent; not indeed cut off from foreign influences or even foreign conquest, but far less exposed to violent cataclysms, and far more immune from revolutions imposed from without. As to the effect of the flexibility of the Constitution upon its continuity enough has been already said.

I pass on to notice another well-marked feature of the English Constitution—its *Legality* and *Impartiality*. To the illustration of these characteristics, Mr. Dicey has devoted a large part of his great work on *The Law of the Constitution*, and in what immediately follows I can do no more than summarize his argument. By the 'legality and impartiality' of English Institutions I mean to express briefly the rule, predominance or supremacy of law. But what is meant by the 'rule of law'? This 'rule' may be resolved into three distinct propositions:—

(1) 'That no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of

[1] *Studies in History and Jurisprudence*, i. 166

law established in the ordinary legal manner before the ordinary courts of the land';

(2) 'That not only is no man above the law but (what is a different thing) that here every man whatever be his rank or condition is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals'; and

(3) 'That with us the law of the Constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals as defined and enforced by the courts'.

For a full explanation and illustration of these important propositions reference must be made to Mr. Dicey's work.[1] But no review, however summary, of the leading features of our Constitution could pretend to completeness which did not emphasize these fundamental conceptions.

The first asserts, in the most emphatic manner, the right of the individual citizen to personal liberty. No man is punishable except for a proved offence against the law. Observe two points: (1) there must be a distinct breach of the law; and (2) this breach must be proved in the ordinary legal manner before the ordinary courts of the land. To us such a proposition must seem to be an obvious commonplace. But if we would understand its full significance, we need only turn to the experience of France under the Ancien Régime, or to our own in the first half of the seventeenth century. Charles James Fox, on hearing of the fall of the Bastille (July 14, 1789) is said to have exclaimed: 'How much the greatest and best event that ever happened in the history of the world!' To us such an exclamation would seem to be the outcome of political hysteria. It becomes intelligible, however, when we realize that the Bastille was the outward and visible sign of a judicial system

[1] *Law of the Constitution*, esp. Lectures V, VI, VII.

which was the negation of the first proposition of our 'rule of law'. Hundreds of men had under that system suffered loss of liberty not for distinct and proven breaches of the law but because they had rendered themselves obnoxious to those who were powerful enough to procure a *lettre de cachet* consigning their enemies to imprisonment which might be lifelong. The Bastille stood not for the rule of law, but for the rule of privilege. Hence its destruction was hailed, alike by Frenchmen and by sympathizers abroad, with an enthusiasm which to the average Englishman seems hysterical. In proportion, however, as we appreciate the blessings of the 'rule of law', we can sympathize with the destruction of the rule of might.

But it is unnecessary to go to France to illustrate the significance of this feature of our Constitution. The great contest of the seventeenth century in England is sometimes regarded too exclusively from a parliamentary standpoint. It was, however, a struggle not merely for parliamentary liberty, but for personal liberty. Both were threatened by the methods adopted by the Stuarts. Many men suffered both in purse and person who had never been proved guilty of any breach of the law established in the ordinary legal manner before the ordinary courts. Various extraordinary tribunals deprived the subjects of those liberties which were thought to be guaranteed by *Magna Carta* and many subsequent enactments. The Court of Star Chamber, the High Commission Court, the Council of the Welsh Marches, the Council of the North, the Castle Chamber in Dublin, and other Prerogative Courts, grievously oppressed the subjects of the King. The 'High Commission grew to such excess of sharpness and severity as was not much less than the Romish Inquisition'; the 'Court of Star Chamber both abounded in extravagant censures . . . whereby His Majesty's subjects have been oppressed by grievous fines, imprisonments, stigmatizings,

mutilations, whippings, pillories, gags, confinements, banishments. . . .'[1] So ran the *Grand Remonstrance*, and few Acts of the Long Parliament were passed with such universal acclaim as that which provided for the abolition of the Star Chamber and other extraordinary tribunals.

But the mischief was even more deep-seated. The extension of the jurisdiction of the extraordinary courts was bad enough, but royal interference with the course of justice in the ordinary courts was, if anything, worse. Nowadays we have two safeguards; there must be, in the first place, a distinct breach of the law, and, in the second, this breach must be proved in an 'ordinary' court. In the first four decades of the seventeenth century the citizen had neither. He was liable to punishment by an extraordinary tribunal, and he was similarly liable at the hands of an ordinary tribunal without a proved breach of the law. The leading case, in illustration of the latter point, is that of *Sir Thomas Darnel* or the *Five Knights* (1627). Darnel and others having been committed to prison by the Privy Council for refusal to contribute to the forced loan of 1626 appealed to the Court of King's Bench for a writ of *Habeas Corpus*. Relying on the clause of *Magna Carta* which declared that 'no man shall be imprisoned except by the legal judgement of his peers or by the law of the land' they urged that they were at least entitled to know for what cause they were detained in custody. The Crown lawyers contended that it was sufficient return to a writ of *Habeas Corpus* to certify that the prisoners were detained *per speciale mandatum regis*—by the special orders of the King. The judges accepted this view so far as to refuse to liberate the five knights on bail, but, on the other hand, they declined to admit the principle that the Crown might persistently refuse to show cause.

The plea of prerogative was, therefore, for the moment

[1] *Grand Remonstrance*, §§ 52, 37.

successful. The discretionary power of the Crown—even to the extent of depriving a subject of liberty—was not to be denied by Stuart judges. But the triumph of the Crown—none too emphatic—was of short duration. Nothing did more to move the Parliament of 1628 to enthusiastic acceptance of the *Petition of Right* than the doctrine affirmed in the case of the *Five Knights*. The Petition itself, after recital of the clause already quoted from The Great Charter and subsequent Statutes, declared that 'against the tenor of the said Statutes . . . divers of your subjects have of late been imprisoned without any cause showed, and when for their deliverance they were brought before your Justices, by your Majesty's writs of Habeas Corpus . . . and their keepers to certify the causes of their detainer; no cause was certified, but that they were detained by your Majesty's special command, signified by the Lords of your Privy Council, and yet were returned back to several prisons, without being charged with anything to which they might make answer according to the law. . . .' The Petition further demanded that 'no freeman, in any such manner as is before mentioned be imprisoned or detained'.[1]

Taken in conjunction with the abolition of the Prerogative Courts by the Long Parliament (1641) these clauses did much to secure the liberty of the subject and to affirm the 'rule of law'; but more was needed. The second half of the seventeenth century witnessed the completion of the process. The *Habeas Corpus* Act of 1679 at last provided the necessary guarantees for the safeguarding of a principle which had long been theoretically accepted; while the Act of Settlement (1700) removed the Judges from the control of the Executive by enacting that they should in future hold office *quam diu se bene gesserint* instead of during the good pleasure of the King, and at the same time made them irremovable except

[1] Gardiner, *History of England*, vi. 213, and *Select Documents*, pp. 2, 4.

on a joint address from both Houses of Parliament. Thus was the first 'rule of law' definitely established, and the personal liberty of the subject guaranteed.

But if the first rule illustrates the 'legality' of our Constitution the second supplies a guarantee for its impartiality. It is commonly said that in England 'there is one law for all', that 'all men are equal before the law'. It may be doubted whether half the people who quote these aphorisms are aware of their precise significance. They not only affirm an important principle, but point an instructive contrast. In England not only is no man 'above the law', but every man is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. Upon this principle depends (1) the responsibility of all officials from the highest to the lowest, and (2) the right of the subject, however humble or obscure, to seek redress for any injury or wrong inflicted by them, and (3) to seek it in the ordinary tribunals. This vastly important right accrues from the fact that in England we know nothing of *administrative law* or *administrative tribunals*. In France, on the contrary, the whole administrative system rests upon the existence of administrative law dispensed in special administrative tribunals. The resulting difference can be brought home by a very simple illustration. Driving across London from Victoria to Paddington, you find Park Lane closed by order of the Police authorities or the First Commissioner of Works. As a result you miss your train at Paddington and consequently fail to fulfil an engagement. If you have reason to suspect that the Police or the Board of Works have exceeded their authority it is open to you to bring an action for damages and the action will lie in an ordinary court and be decided by ordinary rules of law. A similar accident befalls you in Paris. But in that case redress must be sought in an Administrative Court and the issue being one between a private citizen and a Government

official will be decided not according to the ordinary rules of law, but by special rules known as *droit administratif.* It is not difficult to understand what strength such a system imparts to the executive officers of Government, and, on the other hand, how seriously it curtails the liberty of the individual citizen. Of all the guarantees for their liberty the most effective is to be found in the responsibility of all officials, from the highest to the lowest, to the ordinary law administered in the ordinary courts.

The matter is one which demands exhaustive treatment and illustration. I allude to it here merely with the restricted object of emphasizing a special feature of the English Constitution, its inherent legality, and its peculiar impartiality as between the Government and its officials and the private citizen.

Not less significant is the third of Mr. Dicey's propositions on the Rule of Law;—the fact that in England the rights of individuals are the source and not the consequence of the Law of the Constitution. But significant as it is, it raises questions which may be more conveniently discussed later on.

It remains to notice another outstanding feature of the English Constitution—its *Unreality.* It has been said with much speciousness that in the English Constitution 'nothing is what it seems or seems what it is'. Bagehot doubtless had this characteristic in view when he declared, despite a Monarchy unequalled in dignity and splendour, despite a House of Lords, largely hereditary in composition, that we lived 'under a veiled republic'. Bagehot wrote at a moment when the Crown was temporarily withdrawn from the public gaze. How courageously and conscientiously Queen Victoria continued, despite her private sorrows, to transact business of State is now known to all. But five-and-forty years ago it was known to few, and a publicist might be justified in a description which would no longer

be accepted as accurate. But it remains true that language and forms are still in use which were appropriate to a time when the Crown was the real ruler of the realm, but which have now become archaic if not actually misleading. Again: we habitually speak of Parliament as the Legislature, of the Cabinet as the Executive, whereas the fact is that the Cabinet has, to a large extent, usurped the legislative function. It is almost solely responsible for the selection of the *topics* of legislation; it determines the order of legislation, and it gives to legislative projects both their colour and form. In a word, the Cabinet has secured the vastly important right of initiation. But with a fine disregard for actualities we continue to describe the Cabinet as an executive and not a legislative body. Once again: in theory, the legislative power of the House of Lords is co-ordinate with that of the House of Commons; in practice, as every one knows, this is very far from being the case. In theory, the King still selects the Ministers of State who are still known as 'His Majesty's Servants'. Even in the choice of the Prime Minister the Crown is restricted within narrow limits, and in regard to other political appointments the Prime Minister is all-powerful.

These 'unrealities', this wide divergence between theory and fact, render it peculiarly difficult to analyse or to describe the actual working of English institutions. Foreigners in particular find them, to an exceptional degree, elusive, owing to the combination of 'unreality' and 'flexibility': of perpetual change, and wide variations between theory and fact

CHAPTER III

THE EXECUTIVE: (1) FORMAL: THE CROWN

'Nec regibus infinita aut libera potestas.'—TACITUS, *Germania*.

'Rex autem habet superiorem, Deum scilicet; item legem per quam factus est rex; item curiam suam, videlicet comites, barones, quia comites dicuntur quasi socii regis, et qui habet socium habet magistrum: et ideo si rex fuerit sine fraeno, id est sine lege, debent si fraenum ponere, nisi ipsimet fuerint cum rege sine fraeno.'—BRACTON (13th century).

'A King of England cannot at his pleasure make any alterations in the laws of the land, for the nature of his government is not only regal but political.'—SIR JOHN FORTESCUE, *De Laudibus Legum Angliae* (15th century).

'Lex facit regem; the King's grant of any favour made contrary to the law is void; what power the King hath he hath it by law, the bounds and limits of it are known.'—HOOKER (16th century).

'The executive part of Government . . . is wisely placed in a single hand by the British Constitution for the sake of unanimity, strength and despatch. The King of England is therefore, not only the chief but, properly the sole magistrate of the nation; all others acting by commission from and in due subordination to him.'—BLACKSTONE (18th century).

'The direct power of the King of England is very considerable. His indirect and far more certain power is great indeed.'—BURKE.

'Little are they who gaze from without upon long trains of splendid equipages rolling towards a palace conscious of the meaning and force that live in the forms of a Monarchy, probably the most ancient, and certainly the most solid and most revered in all Europe. The acts, the wishes, the example of the Sovereign in this country are a real power. An immense reverence and tender affection wait upon the person of the one permanent and ever faithful guardian of the fundamental conditions of the Constitution.'—W. E. GLADSTONE (19th century).

AN attempt was made in the preceding chapter to indicate a few of the salient characteristics of English Institutions as a whole: their extraordinary flexibility; their unbroken historical continuity; their 'legality' or sub-

ordination to the rule of law, and their unreality—the wide divergence between the formal and the practical, between theory and fact.

In the present and following chapters I propose to investigate the structure of the State: to indicate the functions and sketch briefly the history of the chief organs of government. Those organs in England, as in all civilized States of the modern world are three: (1) that which is concerned with the laying down of general rules—the *Legislature* or law-making organ; (2) that which is concerned with the application of general rules to particular cases—the *Judiciary*, or law-interpreting organ; and (3) that which is concerned with enforcing the orders of the Courts, and the rules laid down by statute, and generally administering the business of the State—the *Executive*.

According to the modern theory, which has prevailed from Montesquieu onwards, it is desirable, in the interests of good government, that these functions should be performed by different people, organized into distinct Institutions. This doctrine of the 'separation of Powers' was all-powerful at the time when the American Constitution was framed and was largely responsible for several of its most characteristic features. It was in pedantic adherence to the same principle that the Constitution makers of the French Revolution decreed the divorce of the Executive from the Legislature. Theoretically, the same principle has long been accepted by publicists in England, and has practically influenced the development of English Institutions.

It would indeed be hardly an exaggeration to say that the history of Political Institutions in England is the history of the differentiation of the functions of the Legislature, the Executive, and the Judiciary. In Anglo-Saxon times all three functions were performed by the King. The King was the supreme Legislator, though always 'with the counsel and consent of the "wise"'. Thus we have the *Dooms* of

Ethelbert, of Ine, of Alfred, of Edward the Elder, of Edgar, and the rest. But this legislation is concerned largely with what we should now regard as Executive business—primarily with the preservation of the peace. The King, again, is the supreme Executive: the leader of the host in arms, the guardian of the 'King's Peace'. The King, finally, is the supreme Judge. In theory, indeed, there has been little change in this respect between the days of Edward the Elder and those of Edward VII. Now, as then, the King, with the counsel and consent of the wise, *makes* the laws; the King, through the mouth of his Judges, *interprets* the law, and the King, with the aid of a vastly complicated administrative machine, puts the law into execution. But the point to observe is that nowadays the King has transferred his several functions to separate bodies. In early times it was otherwise. This transference and specialization of functions was, however, a slow process. The King's Court (*Curia Regis*) was, in Norman and early Angevin times, Legislature, Executive, and Judiciary in one. We should now deem it a hardship if in a dispute with a tax-collector (Executive) we could not appeal to a judicial tribunal which though the 'King's Court' could be relied upon to decide impartially between the claims of the Crown and those of a private citizen. But in the twelfth century the functions of the Judges were at least as much fiscal as judicial. The same thing is true of the King's local representative, the shire-reeve.[1] It is no less true of the Tudor 'man-of-all-work'—the Justice of the Peace.[1] The 'Stacks of Statutes', under which Lambarde groaned, assigned to the county-magistrate functions which were partly judicial, partly legislative, partly administrative. He had, for example, to try offenders against the law, to relieve the poor, to fix wages, and to 'set on work' the lusty unemployed. Such a confusion of functions seems to the citizen of the modern

[1] See *infra*, c. xiii.

State, and more particularly to the modern Englishman, to be a serious menace to personal liberty. When judges are makers as well as interpreters of the law no one knows (to use a colloquialism) 'where he stands'. 'Si la puissance de juger,' writes Montesquieu, 'était jointe à la puissance legislative, le pouvoir sur la vie et la liberté des citoyens serait arbitraire,'[1] and to make members of the Executive judges in all cases which concern administrative acts seems to the Englishman hardly less destructive of liberty than to combine the functions of law-maker and judge.

The principle of the 'separation of powers' being thus generally admitted, we may proceed to consider first the history, position, and functions of the Executive in England. If we were approaching our subject deductively from the point of view of political *theory*, it would be more logical, since laws must be made before they can be administered, to begin with the law-making organ and consider the problem of the Legislature. But our method is *historical* or inductive, and that being so we may properly begin, for reasons which will appear later, with the Executive.

The problem to be solved has never been better stated than by an old-fashioned writer. 'The great problem of Government is to make the Executive power sufficiently strong to procure the peace and order of society and yet not to have it sufficiently strong to disregard the wishes and happiness of the community.'[2] That end has been practically secured in England, as will be shown presently, by a device which has given to the English Constitution its most fundamental, most characteristic, and perhaps most interesting feature. But supreme Executive authority remains, as it always has been, vested in the Crown. With the position of the Crown, therefore, we begin our investigation.

[1] *Esprit des Lois*, xi. c. vi.

[2] William Smyth, Regius Professor of Modern History at Cambridge (1807–49).

The history of the English Monarchy is divided into two unequal portions by the Revolution of 1688. The central point at issue in the great contest of the seventeenth century was—on the political side—the control of the Executive. As to the existence of a parliamentary Legislature there was no real question. Bacon and Strafford were at one with Eliot and Pym as to the advantages derived by the Monarchy from the periodical meetings of an elected Legislature.

'Look on a Parliament as a certain necessity, but not only as a necessity; as also a unique and most precious means for uniting the Crown with the Nation, and proving to the world outside how Englishmen love and honour their King, and their King trusts his subjects. Deal with it frankly and nobly as becomes a king, not suspiciously like a huckster in a bargain. Do not be afraid of Parliament. Be skilful in calling it; but do not attempt to "pack" it. Use all due adroitness and knowledge of human nature, and necessary firmness and majesty, in managing it; keep unruly and mischievous people in their place; but do not be too anxious to meddle, "let nature work"; and above all, though of course you want money from it, do not let that appear as the chief or real cause of calling it. Take the lead in legislation. Be ready with some interesting or imposing points of reform or policy, about which you ask your Parliament to take counsel with you. Take care to "frame and have ready some commonwealth bills, that may add respect to the King's government, and acknowledgement of his care; not *wooing* bills to make the King and his graces cheap; but good matters to set the Parliament on work, that an empty stomach do not feed on humour".'

Such was, in substance, the sagacious advice tendered by Bacon to James I. Between Crown and Parliament there could in his view be no essential antagonism. And Bacon's language is echoed in that of Sir John Eliot:—

'For the King's Prerogative no man may dispute against it; it being an inseparable adjunct to regality. . . . For

the privileges of Parliament they have been such and so esteemed as neither to detract from the honour of the King, nor to lessen his authority. . . . This methinks should endear the credit of our Parliaments that they intrench not upon but extend the honour and power of the King . . . Parliament is the body: the King is the spirit; the author of the being of Parliament. What prejudice or injury the King shall suffer, we must feel.'

But while there was no difference of opinion as to the existence of a Parliament there was much as to its functions. Bacon would have had it vote taxes, help to make laws, and keep the King well informed as to the state of public feeling. The functions of Parliament were, in a word, to be legislative, taxative, and informative. To these Pym and his party desired to add a fourth and to give to Parliament an effective control over the Executive. To this extension of functions the older fashioned constitutionalists, Bacon, Strafford, Hyde, and the like, strongly demurred. That Parliament should be permitted to meddle in the 'mysteries of State', that it should interfere in the intricacies of foreign policy, that it should presume to exercise a continuous control over the Executive, that it should hold the servants of the Crown responsible to itself was unthinkable. This was, however, the point on which from the outset of the contest Eliot, and after him Pym, laid most stress. 'That His Majesty be humbly petitioned by both Houses to employ such counsellors, ambassadors, and other ministers, in managing his business at home and abroad as the Parliament may have cause to confide in, without which we cannot give His Majesty such supplies for support of his own estate, nor such assistance to the Protestant party beyond the sea, as is desired.'[1] So ran the most significant clause in the *Grand Remonstrance* of 1641.

Despite the emphasis thus laid upon the principle that the King's ministers must be responsible to Parliament, the two great constitutional declarations of the century are

[1] *Grand Remonstrance*, § 197.

on this point uniformly silent. Neither in the Petition of Right (1628) nor in the Bill of Rights (1689) is there any direct reference to the matter.

The silence of these great documents on a question of the first constitutional significance is exceedingly characteristic of the Revolution settlement, and indeed, more generally, of English constitutional development.[1] Not even in 1689 was there any attempt to codify or even to reduce to writing the leading principles of the Constitution. There is barely a hint as to the relations which ought to subsist between the Executive and the Legislature. It was enough for the Englishmen of that day, as of other days, to provide adequate remedies for the definite and concrete abuses which recent experience had revealed. The 'suspending' power and the 'dispensing power as it hath been assumed and exercised of late' are declared to be illegal; the High Commission Court and courts of like nature are declared to be 'illegal and pernicious'; the levying of extra-Parliamentary taxation, the maintenance of a standing army in time of peace, excessive fines and similar iniquities are denounced; Parliaments are to be held frequently; members are to be freely elected and their privileges are to be secured. Precautions are thus taken against a repetition of the familiar incidents of Stuart tyranny, but no attempt is made to decide effectually and formally the great Constitutional issue which was the core of the contest of the seventeenth century.

Thus despite the fact of the Puritan Revolution, despite the *Petition of Right*, and the *Act declaring the Rights and Liberties of the Subject*, the formal powers of the Crown under Edward VII are virtually the same as those which belonged to it under Edward VI. Now, as then, the King

[1] Cf. a similar and even more remarkable silence on the same point in the Canada *Union Act* of 1840—an Act intended primarily to confer 'responsible' government upon Canada.

is the supreme Executive authority; the King in Parliament is still the supreme Legislative authority; the King is still the 'fountain of honour' and the 'fountain of justice'; the King is still supreme Head of the Church: 'over all causes ecclesiastical as well as temporal within his dominions supreme'; the King is still commander of the military forces of the realm by land and sea; the King is still the 'Great Leviathan', embodying in his own person the dignity and the unity of the State. Forty years ago Bagehot startled his contemporaries by an examination of some of the legal powers of the Crown, by telling them what the Queen could do without consulting Parliament. 'The Queen', he wrote, 'could disband the army (by law she cannot engage more than a certain number of men); she could dismiss all the officers, from the General Commanding-in-Chief downwards; she could dismiss all the sailors too; she could sell off all our ships of war and all our naval stores; she could make a peace by the sacrifice of Cornwall, and begin a war for the conquest of Brittany. She could make every citizen in the United Kingdom, male or female, a peer; she could make every parish in the United Kingdom a "university"; she could dismiss most of the civil servants; she could pardon all offenders. In a word, the Queen could by prerogative upset all the action of civil government within the Government, could disgrace the nation by a bad war or peace, and could, by disbanding our forces, whether land or sea, leave us defenceless against foreign nations.'[1]

Such are the legal powers of the Crown to-day.

But although the Revolution of 1688 affected little, if at all, the legal and technical prerogatives of the Crown, it is none the less true that it marked an epoch of immense significance in our constitutional development, and registered an important and permanent change in the balance

[1] Bagehot, *English Constitution*, p. xxxvi.

of political forces within the State. Down to 1688 the Crown was the efficient factor in the Constitution; the King ruled as well as reigned; on the character of the monarch depended the government of the State. Thenceforward it was otherwise; the centre of political gravity shifted from Crown to Parliament; the King still reigned, but he gradually ceased to rule. From the great contest for *Sovereignty* Parliament emerged victorious, and slowly but surely the Executive as represented by the Crown has been brought into subjection to the Legislature, representing in its turn the political sovereign or electorate.

Many convergent causes contributed to this result. Before detailing them it is proper to point out that the subordination of the Executive to the Legislature was not attempted for the first time in the eighteenth century. The experiment had already been tried in the fifteenth under the rule of the Lancastrians. From 1404 to 1437 the King's Council was not merely dependent upon Parliament, but was actually nominated in it: the subordination of Executive to Legislature was never so complete. But the result was a dismal failure. And it is pertinent and instructive to inquire why a political device which justified itself so completely at a later period so signally failed in the earlier?

'Responsible Government' is no simple or easy thing. It demands for its success conditions—social and political—which are never found except in highly developed societies. In the England of the fifteenth century some of the conditions were notably absent. 'Constitutional progress', to quote a pregnant aphorism of Bishop Stubbs, 'had outrun administrative order.' Politically advanced, the nation was socially backward. The development of the parliamentary machinery had been too rapid for the intelligence of the nation at large. The result was that while Parliament was busy in establishing its rights against the Crown, the nation was sinking deeper and deeper into social anarchy. A small

knot of powerful barons were reproducing some of the worst features of feudalism without its redeeming advantages. Private wars became more common than they had ever been since the miserable days of Stephen. Baron was at war with baron; county with county; town with town. Disbanded soldiers coming home from the French wars took service with rival chieftains, accepted their liveries, and fought their battles. The great lord, in turn, protected or, to use the technical term, 'maintained' his liveried followers and shielded them from the punishment due to their crimes of violence. Thus law was paralysed; justice became a mockery; and the whole nation, outside the charmed circle of the great lords and their retainers, groaned under the 'lack of governance' which quickly became the byword of Lancastrian administration. Plainly the nation 'was not yet ready for the efficient use of the liberties it had won'. The time for a parliamentary Executive had not come; and the people, reduced to social confusion by the weak and nerveless rule of the Lancastrians, involved in aristocratic faction fights to which the quarrels of York and Lancaster gave a deceptively dynastic colour, at length emerged from these 'Wars of the Roses' anxious for the repose and discipline secured to them by the New Monarchy.

For a century the Tudors continued to administer the tonic which they had prescribed to a patient suffering from social disorder and economic anaemia. The evolution of the parliamentary machinery was temporarily arrested, but, meanwhile, the people throve socially and commercially. Aristocratic turbulence was sternly repressed; extraordinary tribunals were erected to deal with powerful offenders; vagrancy was severely punished; work was found for the unemployed; trade was encouraged; the navy was organized on a permanent footing; scientific training in seamanship was provided; excellent secondary

schools were established—in these and in many other ways the New Monarchy, despotic and paternal though it was, brought order out of chaos and created a new England. The maintenance of law; the growth of a strong middle class; the diffusion of wealth and education; above all, the critical temper of Protestantism, reacted in their turn upon political development. The result was that by the close of the sixteenth century the nation was ready, as it had not been ready at the beginning of the fifteenth, for the 'efficient use of the liberties it had won'. The Tudor 'dictatorship' had done its work. In no direction were its results more clearly marked than in the broadening and strengthening of parliamentary institutions. The experiment of making Parliament the direct instrument of Government had broken down in the fifteenth century because it was premature; because the political intelligence and the social development of the people at large lagged hopelessly behind the structural evolution of the parliamentary machine. Thanks in part to the strong and bracing rule of the Tudors and in part to a many-sided economic revolution, social had now caught up political development. Consequently, the Stuarts from the moment of their accession found themselves confronted by a people not merely ready but anxious to take upon their own shoulders the high responsibilities of self-government.

The 'Apology' drawn up by Parliament in 1604 sufficiently attests the new temper of the nation. In that famous document the Commons made it abundantly clear that the era of the Tudor dictatorship was definitely closed, and that they were no longer disposed to acquiesce in the virtual suspension of their privileges and authority. The King, they avowed, had been grossly misinformed alike as to the 'estate of his subjects of England', as to 'matter of religion', and as to 'the privileges of the House of Commons', and it was their bounden duty to set him right.

'We stand not in place to speak or do things pleasing. Our care is, and must be, to confirm the love and tie the hearts of your subjects, the Commons, most firmly to your Majesty. Herein lieth the means of our well deserving of both: there was never prince entered with greater love, with greater joy and applause of all his people. This joy, this love, let it flourish in their hearts for ever. Let no suspicion have access to their fearful thoughts, that their privileges, which they think by your Majesty should be protected, should now by sinister informations or counsel be violated or impaired; or that those, which with dutiful respects to your Majesty, speak freely for the right and good of their country, shall be oppressed or disgraced. Let your Majesty be pleased to receive public information from your Commons in Parliament as to the civil estate and government; for private informations pass often by practice: the voice of the people, in the things of their knowledge, is said to be as the voice of God. And if your Majesty shall vouchsafe, at your best pleasure and leisure, to enter into your gracious consideration of our petition for the ease of these burthens, under which your whole people have of long time mourned, hoping for relief by your Majesty; then may you be assured to be possessed of their hearts, and, if of their hearts, of all they can do or have.'[1]

The language was respectful, but its significance was unmistakable. Consideration for the old Queen combined with anxiety as to the succession had conduced to a conscious postponement of the constitutional issue. 'In regard of her (Queen Elizabeth's) sex and age, which we had great cause to tender and, much more, upon care to avoid all trouble, which by wicked practice might have been drawn to impeach the quiet of your majesty's right in the Succession, those actions were then passed over, which we hoped in succeeding time of freer access to your highness of renowned grace and justice, to redress, restore, and rectify.'

Thus, in the very first year of the new reign was the keynote of the impending struggle struck. To follow the

[1] *State Papers* (Dom.), James I, viii. 70.

incidents of that struggle is no part of my purpose. It must suffice to recall one or two of the more important landmarks. For five-and-twenty years James I, and his son after him, attempted the impossible task of reconciling the Stuart theory of kingship with the advancing claims of Parliament and particularly of the House of Commons. The first act of the drama closes with the concession of the Petition of Right (1628), with the dissolution of Charles's third Parliament (1629), and the death in the Tower of the 'protomartyr of Parliamentary independence', Sir John Eliot (1633). The Petition of Right determined no general principles, but, after our English manner, provided certain remedies for the more flagrant of the practical grievances which had been disclosed by the experience of the last three years. Then followed a period of personal government, during which the Crown was unfettered either by the opposition of Parliament or by the decisions of an independent Judiciary. For eleven years (1629—1640) no Parliament met; the ordinary administration of justice was set aside by the Star Chamber and other extraordinary tribunals; money was raised for the necessities of the Crown by all manner of peculiar expedients; Wentworth was let loose upon Ireland (in the main to its advantage); Laud was let loose upon England and even upon Scotland, with results which proved fatal to the Stuart Monarchy. The first signal of overt resistance was given by Scotland. To require Scotland to accept Arminianism at the hands of Laud was like asking England to accept Roman Catholicism at the hands of Philip II. Intensely national and intensely Calvinistic, Scotland 'bristled into resistance', and Charles I was consequently compelled to meet his Parliament again.

The Long Parliament spent the first few months of its existence in breaking into fragments the machinery of 'Thorough' and in wreaking vengeance upon the leading

agents of that system. Strafford and Laud paid the penalty for the failure of the experiment of personal rule. A few years later the King himself paid the penalty for the failure of his appeal to arms (1649). The death of Charles I was quickly followed by the abolition of the Monarchy. On March 17, 1649, the Rump of the Long Parliament employed such remnant of legal authority as it still retained to pass an 'Act' abolishing the office of king.

'Whereas,' so the 'Act' ran, 'Charles Stuart, late King of England, Ireland, and the territories and dominions thereunto belonging, hath by authority derived from Parliament been and is hereby declared to be justly condemned, adjudged to die, and put to death for many treasons, murders, and other heinous offences committed by him. . . . And whereas it is and hath been found by experience that the office of a king . . . is unnecessary, burdensome and dangerous to the liberty, safety and public interest of the people, and that for the most part use hath been made of the regal power and prerogative to oppress and impoverish and enslave the subject . . . be it, therefore, enacted and ordained . . . that the office of king shall not henceforth reside in or be exercised by any one single person; and that no one person whatsoever shall or may have or hold the office, style, dignity or authority of King of the said kingdoms or dominions.'

It was comparatively easy to get rid of the Monarch; it was much more difficult to get rid of the Monarchy. The 'Rump' made a bold bid for Sovereignty, perpetual, unrestrained and undivided; but Cromwell and the army intervened to prevent this usurpation; and Cromwell, little to his liking, found himself invested with a Sovereignty limited only by the necessity for retaining the loyalty of his Ironsides. To devolve upon a representative Assembly some portion of his heavy responsibility was the immediate and constant anxiety of Cromwell. Hence the summoning of the convention of Puritan notables commonly known as Barebone's Parliament. A few months sufficed to demonstrate the failure of this experiment, but Cromwell never-

theless persevered. The *Instrument of Government* provided for the election of a single-chambered Legislature. Its brief but stormy existence proved that, though the Stuart monarchy was overthrown, the problem which had divided the Stuart monarchs and their parliaments was still unsolved. Cromwell was no more disposed than Strafford or Charles I to subordinate the Executive to the Legislature. Nay; he was not even willing to concede to parliament constituent powers. Legislate they might, and freely, but it must be within the four corners of the 'Instrument'; circumstantials only were within their competence; 'Fundamentals' they must not touch.[1] This subordinate position parliament was unwilling to accept, and at the first legal opportunity it was dissolved by the Protector. Cromwell and many of his wisest counsellors believed that the breakdown of the experiment was due to the uni-cameral structure of the parliament. Consequently a second attempt was made with a renovated 'Upper House'. But with no better results. The old difficulties reappeared. Cromwell had summoned Parliament to make laws; they claimed the right to revise the Constitution and to criticize the Executive. They forgot that, disguise it how he might, the monarchy of Cromwell rested upon the sword. Had Strafford been master of Cromwell's legions the proud Lieutenant would have made short work of the Long Parliament. That Cromwell was honestly anxious to assign to an elected parliament a place in the Constitution can be denied by no unprejudiced person; but it was a strictly subordinate place. On their refusal to accept it, they had to go.

But Cromwell left no successor. His son Richard, though installed as Protector, was a poor creature and quite unequal to the task of reconciling the military and civil powers. Army and Parliament were once more at logger-

[1] Cf. *supra*, p. 17.

heads; all classes cried loudly for a 'settlement'—particularly the merchants, and it was soon perceived that there could be no permanent settlement without a restoration of the legitimate monarchy.

The Restoration of 1660 had, therefore, a threefold significance: (i) it marked the triumph of the monarchical idea; (ii) the triumph of parliamentary government and, (iii) above all, the negation of the military principle. 'No Bishop, no King' was the formula which embodied the alliance between the Stuarts and the Anglican Church. 'No King, no Parliament' might have been adopted as the motto of the Restoration of 1660.

But the Stuarts had learned their lesson very imperfectly. The native shrewdness and extraordinary political adroitness of Charles II enabled him to outmanœuvre the Whigs, and despite accumulating unpopularity to retain the Crown until his death. His brother had more conscience and less dexterity. With an ingenuity almost unique he contrived simultaneously to alienate Anglicans and Nonconformists, Tories and Whigs, the country gentlemen and the traders of the towns. Thus, after the inconclusive interlude of the second Stuart Monarchy, we work back to the point from which we started, the Revolution of 1688.

That Revolution, as we have already seen, did not materially affect the legal and technical powers of the Crown. Nevertheless this epoch is generally and properly selected as the real beginning of the responsibility of the Executive to the Legislature, of the Crown and its ministers to Parliament. This paradox can be fully resolved only when we come to deal with the evolution of the Cabinet. Meanwhile we may summarily point out that this subordination was effected indirectly and by a combination of circumstances.

Considerable importance must no doubt be attached to the change in the person of the Monarch. 'It was', writes

Macaulay, 'even more necessary to England at that time that her King should be a usurper than that he should be a hero. There could be no security for good government without a change of dynasty. . . . It had become indispensable to have a sovereign whose title to the throne was bound up with the title of the nation to its liberties.' The point is put with characteristic exaggeration: William III did not represent a new 'dynasty', still less did his wife; the deviation from the strict line of hereditary succession was, as Burke pointed out, the slightest possible compatible with the maintenance of a Protestant Monarchy; nor was any effort wanting to cover the 'revolution' with the cloak of legality. Nevertheless, the deviation was sufficient, as in the parallel case of Henry IV, to mark a real change in the relation of the Crown to the nation, and to register an important stage in the evolution of the supremacy of Parliament.

To the same result the increased regularity in the meeting of Parliament itself materially contributed. It was impossible that the Executive should be really responsible to the Legislature so long as the meeting of the latter was irregular, capricious, and uncertain. The impossibility of dispensing with a standing army; the jealousy with which its recent establishment was regarded, and the necessity for the annual renewal of the Act upon which its discipline depended, secured, by a device characteristically devious, the annual meeting of the Legislature.

The change in the mode of granting supplies to the Crown, and the institution of a Civil List, further contributed to the same result. Hitherto the King had borne the whole charge of Government: between the royal revenue and the national revenue there had been no distinction. Under Charles II, indeed, the Commons had successfully maintained their exclusive right to determine 'as to the matter, measure, and time of every

tax', and the principle of the appropriation of subsidies to particular purposes was definitely established. But it is with the Revolution that the effective control of the House of Commons over national expenditure really begins. To William III, Parliament voted a revenue of £1,200,000 a year, of which £700,000 was appropriated to the support of the Royal Household, the personal expenses of the King, the payment of civil officers, &c.; the rest being appropriated to the more general expenses of administration. George III, in return for a fixed Civil List, surrendered his interest in the hereditary revenues of the Crown. William IV went further, and surrendered not only the hereditary revenues but also certain miscellaneous and casual sources of revenue in return for a Civil List of £510,000 a year divided into five departments. To each of these a specific annual sum was assigned, and at the same time the Civil List was further relieved of certain extraneous charges which were properly national or parliamentary. The process was completed at the accession of Queen Victoria when the Civil List was fixed at £385,000 distributed as follows: (1) Privy Purse, £60,000; (2) Household Salaries, &c., £131,260; (3) Royal Journeys, &c., £172,500; (4) Royal Bounty, £13,200; (5) Unappropriated, £8,040. At the same time opportunity was taken finally to transfer to Parliament all charges properly incident to the maintenance of the State[1] as distinct from the personal expenses of the Sovereign. Thus, as Erskine May well remarks, 'while the Civil List has been diminished in amount its relief from charges with which it had formerly been incumbered has placed it beyond the reach of misconstruction. The Crown repudiates the indirect influence

[1] The Crown still enjoys the revenues of the Duchies of Lancaster and Cornwall, the latter being part of the appanage of the Prince of Wales. The former now produces about £60,000 a year; the latter about £80,000 a year.

exercised in former reigns and is free from imputations of corruptions. And the continual increase of the civil charges of the Government, which was formerly a reproach to the Crown, is now a matter for which the House of Commons is alone responsible. In this, as in other examples of constitutional progress, apparent encroachments upon the Crown have but added to its true dignity, and conciliated more than ever the confidence and affections of the people.'[1]

The sum voted to Queen Victoria proved, in the latter years of the reign, despite the economical management of the Household, inadequate to the maintenance of the royal state. The Civil List of King Edward VII was, therefore, fixed at a somewhat higher figure—£470,000.[2] But this did not involve an additional charge upon the national Exchequer. The value of the hereditary revenues surrendered to the nation by Queen Victoria, on her accession, amounted only to £245,000 a year; their value when surrendered by King Edward VII was £452,000.[3] The nation, therefore, may be said to have made a very advantageous bargain with the Crown. But to return to the Revolution of 1688.

The subordination of the Executive to the Legislature was not effected at a single stroke; it was indeed far from complete either under William III or Queen Anne. The real moment of transition must be assigned to the next reign—that of George I. The accession of a King, who

[1] *Constitutional History*, i. 247.

[2] That of King George V has been fixed at the same sum.

[3] The 'hereditary' revenues are chiefly from Crown lands now managed by the Commissioners of Woods and Forests; but technically they include also the 'hereditary' excise duties granted to Charles II, but long in abeyance; the compensation for wine licence revenue, and the hereditary Post Office revenue. The sums mentioned above represent the net income from the hereditary lands of the Crown, apart from the Duchies of Lancaster and Cornwall.

despite English blood, was in all essentials a foreigner; the prolonged ascendancy of a great minister under whom the Cabinet for the first time assumed its modern form; and the development of party organization in Parliament itself—all these contributed to the process.

The effective power of the Crown probably reached its nadir under the first two sovereigns of the Hanoverian line. Whether it was, even then, so entirely eclipsed as it was once the fashion to assume, is a question which is beginning to excite historical criticism; but it is certain that such influence as the Crown exercised was felt more decisively in European than in domestic politics.

With the accession of George III there was a real revival of the monarchical idea. The young King came to the throne saturated with the principles of Bolingbroke's *Patriot King*, and determined, in his own person, to put them to the test of practical experiment. His own personality and the political circumstances of the hour were alike favourable to its success. In almost every way the young King stood in marked contrast to his immediate predecessors. The first of his dynasty who could be regarded as English, he rather overplayed the part; but he was simple, manly, and unaffected; his private life was above reproach, and his courage, both moral and physical, was magnificent. Intellectually he was below the average, with all the obstinacy of a rather stupid man; but his prejudices, which were numerous, fortunately coincided with those of the great mass of his subjects. And he had this further advantage. The political forces which during the last half century had rivalled and even eclipsed the Crown were palpably weakening. Parliament was becoming every year more oligarchical both in temper and in composition. 'You have taught me', said George II to Pitt, 'to look elsewhere than to the House of Commons for the opinion of my people.' The lesson was not lost upon his grandson. Increasingly

oligarchical, Parliament was also increasingly disorganized. Since the fall of Walpole the great Whig party had rapidly disintegrated; it was broken up into factions and groups, and could offer little effective resistance to concentrated and sustained attacks. The King pressed home his advantage with unremitting industry and unflagging ardour. He worked like an election-agent, and dined on boiled mutton and turnips in order that he might spend his enormous income in the purchase of the House of Commons. Burke probably exaggerated the cohesion of the 'King's friends',[1] but as to the reality and extent of the King's personal influence upon politics there can be no question. 'Everyone', wrote Horace Walpole, 'ran to Court and voted for whatever the Court desired.' The personal influence of the King reached its zenith during the ministry of Lord North (1770–82). But even before the fall of his favourite minister it was on the wane. The disasters of the American War, disasters laid, not wholly without justification, at the King's door; the acceptance of Mr. Dunning's historic resolutions (1780)[2]; above all, the ferment created by the King's personal interposition to defeat Fox's *India Bill*, seriously damaged the prestige of the Crown. Pitt came to the King's rescue in 1783, and five years later the hatred of opponents was changed to pity by the oncoming of insanity, which, fitful at first, became permanent in 1810.

Under the Regency (1810–20) and the reign of George IV the popularity if not the power of the Crown reached the nadir. George IV had more brains than his father, but much less conscience, and there can be no question that the scandals of his private life, combined with his obstinate resistance to all reform, seriously imperilled the existence of the Monarchy. On the Continent, the restored Monarchies

[1] Cf. *Thoughts on the causes of the present discontents*, passim.

[2] The first of them ran: 'That the influence of the Crown has increased, is increasing, and ought to be diminished.'

were on trial; even in England there were plenty of critics hostile to the institution. 'Oh that the free would stamp the impious name of King into the dust' was an aspiration which if infrequently uttered was widely entertained. Nothing but the unpopularity of the King could have conferred so much popularity upon his unhappy but undeserving Queen. Nevertheless it would be a mistake to underrate the practical influence of George IV upon politics. His alienation from the Whig friends of his youth kept the Tories in power in 1812, and throughout the whole of his regency and reign. Brougham asked the House of Commons to declare that the influence of the Crown was 'unnecessary for maintaining its constitutional prerogatives, destructive of the independence of Parliament and inconsistent with the well-governing of the realm'. It is significant that unlike Dunning's resolutions of 1780 Brougham's was negatived by a large majority. But that the country would have tolerated a succession of George IV's is unlikely. ✓

To him there succeeded in 1830 his brother, William IV, a sailor, bluff, genial, and kind-hearted, but entirely lacking in dignity, not to say in decorum. Under him the popularity of the Crown was restored, but its dignity was still further endangered.

Such was the situation which confronted the young Princess, called to the throne, as Queen Victoria, by her uncle's death in 1837. 'Since the century began,' as one of her biographers pungently puts it, 'there had been three Kings of England . . . of whom the first was long an imbecile, the second won the reputation of a profligate, and the third was regarded as little better than a buffoon.'[1] It was, therefore, the young Queen's first task to re-establish the Monarchy in the respect and affection of the people. More particularly was it her function to win the confidence

[1] Lee, *Queen Victoria*, p. 53.

of the middle classes, who had lately, by the revolution of 1832, become supreme in English politics. For this task she was exceptionally qualified. 'It was', says Mr. Benson, 'supremely fortunate that the Queen by a providential gift of temperament thoroughly understood the middle-class point of view.'[1] How well she succeeded in conciliating to the Crown the affectionate regard of her people the history of her long reign eloquently tells. But it would be misleading to suppose that her success was immediate, or, until the last two decades of her reign, complete. The cartoons of *Punch* reflect with unerring accuracy the public sentiment. In the earlier half of the reign they are far from complimentary to the Queen, and to the Prince Consort they are something less than respectful. In later years the tone changes. The change is clearly due to something more than length of days. The first impulse to it came perhaps from acknowledged misjudgement as to the Prince Consort :—

> We know him now: all narrow jealousies
> Are silent; and we see him as he moved,
> How modest, kindly, all accomplish'd, wise,
> With what sublime repression of himself,
> And in what limits, and how tenderly;
> Not swaying to this faction, or to that;
> Not making his high place the lawless perch
> Of wing'd ambitions, nor a vantage ground
> For pleasure; but through all this tract of years
> Wearing the white flower of a blameless life.

Shortly after the death of the Prince Consort, Mr. Walter Bagehot published his remarkable study on *The English Constitution.* His chapter on the Monarchy opens with the following words :—

'The use of the Queen in a dignified capacity is incalculable. Without her in England the present English

[1] Queen Victoria's *Letters*, i. 28.

Government would fail and pass away. Most people, when they read that the Queen walked on the slopes of Windsor —that the Prince of Wales went to the Derby, have imagined that too much thought and prominence were given to little things. But they have been in error; and it is nice to trace how the actions of a retired widow and an unemployed youth become of such importance.'

The passage is noticeable for several reasons. Bagehot was a genuine believer in the Monarchy as an institution and a sincere admirer of the monarch; but his tone is obviously half-contemptuous and would now be generally resented as barely decorous. For reasons which will be disclosed presently the political position of the Crown is far better understood and more highly appreciated than was the case half a century ago. On the other hand Bagehot's analysis of the non-political functions of the Monarchy could even now hardly be improved upon. He describes the Crown as the pivot of the 'dignified part of the Constitution'. It is an 'intelligible' headpiece and consequently calls forth feelings towards the Government which no form of republican institutions can evoke. 'Royalty is a Government in which the attention of the nation is concentrated on one person doing interesting actions. A Republic is a Government in which that attention is divided between many who are all doing uninteresting actions.' Again: 'the Monarchy strengthens our Government with the strength of religion'; it appeals to sentiments which are not the less real and not the less strong because they are impalpable. It is valuable, also, as excluding competition for the headship of society; and above all as the guardian of the 'mystery' of the Constitution. It 'acts as a disguise'; 'it enables our real rulers to change without heedless people knowing it.' As to the more strictly political functions of the Crown, Bagehot confesses, like most other commentators, his inability to pierce the veil of the mystery in which the political action of the sovereign is

enwrapped. 'We shall never know, but when History is written our children may know what we owe to the Queen and Prince Albert.' In part we do already know. Some portion of the veil has been withdrawn. The materials for an historical judgement are rapidly accumulating. The *Memoirs* of leading statesmen of the Victorian era have disclosed much; the *Letters* of Queen Victoria have revealed more. Fresh light has thus been thrown upon the mysterious working of the Constitution. To what extent it has rendered necessary a modification of constitutional theory is a question which may be postponed to the next chapter.

CHAPTER IV

THE EXECUTIVE: (2) POLITICAL: THE CABINET, THE PRIME MINISTER, AND THE CROWN

'Those persons made up the Committee of State, which was reproachfully afterward called the Junto, and enviously then in Court the Cabinet Council.'—CLARENDON.

'The efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers. No doubt by the traditional theory, as it exists in all the books, the goodness of our constitution consists in the entire separation of the legislative and executive authorities; but in truth its merit consists in their singular approximation. The connecting link is *the Cabinet*. By that new word we mean a committee of the legislative body selected to be the executive body.'—BAGEHOT.

'The Cabinet is the threefold hinge that connects together for action the British Constitution of King or Queen, Lords and Commons . . . Like a stout buffer-spring, it receives all shocks, and within it their opposing elements neutralize one another. It is perhaps the most curious formation in the political world of modern times, not for its dignity, but for its subtlety, its elasticity, and its many-sided diversity of power. . . . It lives and acts simply by understanding, without a single line of written law or constitution to determine its relations to the Monarch, or to the Parliament, or to the nation; or the relations of its members to one another, or to their head.'—W. E. GLADSTONE.

'While every act of state is done in the name of the Crown, the real executive Government of England is the Cabinet. . . . No one really supposes that there is not a sphere, though a vaguely defined sphere, in which the personal will of the Queen has under the Constitution very considerable influence.'—A. V. DICEY (1885).

THE last chapter was concerned primarily with one point of great importance—the process by which the King, for many centuries the pivot of the Constitution and the real

ruler of the realm, has been brought into political dependence upon Parliament, and more particularly upon the House of Commons; or, to use more technical language, the process by which the Executive has been subordinated to the Legislature. But of all the devices employed to effect this virtual transference of supreme political authority the most important still remains to be noted. It is to be found in the evolution of a *Cabinet Council* under the presidency of a Prime Minister.

The Cabinet and the Prime Minister are of all English political institutions the most characteristic. Taken together they are the pivot round which the whole political machine practically revolves; yet neither is in terms known to the law. It is the primary purpose of the present chapter to investigate their genesis, to trace their gradual evolution, and to describe the part they play in the actual working of the Constitution of to-day.

It was shown in the last chapter that the legal powers of the Crown were not seriously curtailed by the Revolution Settlement of 1688–1701. We might have gone further and shown that those powers have on the contrary been enormously extended by the rapid increase in the functions of government and by the delegation of subordinate law-making powers to various administrative bodies (such as the Local Government Board and the Board of Trade) which act in the name of the Crown. But while the *powers* of the Crown have been increased, the *power* of the Crown has been rigorously curtailed. And the apparent paradox is to be explained by the development of an administrative system, the chief officials of which, while nominally the servants of the King, are in reality politically responsible to Parliament. Of these officials the most important have come to form what is popularly known as the Cabinet Council or the *Cabinet*.

What is the Cabinet? It is sometimes described as a

Committee of the Legislature (e.g. by Bagehot), sometimes as a Committee of the Privy Council (e.g. by Hearn). Neither description is strictly accurate; but it is sufficiently true to say that all Cabinet Ministers must be members of one or other House of the Legislature, and must be members of His Majesty's Privy Council.[1] It is further true that to the ancient Privy Council we must look for the origin of the modern Cabinet.

The King's Council has, under various names,[2] a continuous history from Norman days to our own. In the early fifteenth century it was, as we have seen, subjected, with disastrous results, to Parliament. In the sixteenth century it became the all-powerful instrument of Tudor government. Under the Stuarts the Privy Council became utterly unwieldy in size, and consequently useless for administrative purposes. The King, therefore, began to select a few members of the Council with whom to consult on affairs of State. The term *Cabinet* is first found in Bacon's *Essays*; but the first definite allusion to the new constitutional development is, so far as I can ascertain, in Clarendon's account of the year 1640. 'Those persons', he writes (meaning Archbishop Laud, Lord Strafford, Lord Cottington, Lord Northumberland, Bishop Juxon, Sir H. Vane, Sir F. Windebank, and the two Secretaries of State), 'made up the Committee of State, which was reproachfully afterwards called the Junto, and enviously then in Court the Cabinet Council.'[3]

It will be noted that the development was from the first regarded with jealousy and mistrust. This was more conspicuously the case after the Restoration of 1660. Policy dictated the advisability of numerous promotions to the

[1] For more detailed and exact discussion of these points cf. *post*.

[2] *Curia Regis, Concilium Ordinarium, Concilium Secretum* or *Privatum*.

[3] Clarendon, *Rebellion*, Bk. II (vol. i, p. 244).

Privy Council, and Charles II, pleasure-loving and quick-witted, was frankly bored, as Clarendon tells us, by the debates which took place in the Privy Council. He wanted business done more expeditiously and with less talk. Nor could any one deny that for executive purposes the Council had become impossibly large. Clarendon accordingly proposed that the administrative work of the Council should be delegated to four small Committees: one for Foreign affairs; a second for the supervision of the army and navy; a third for trade; and a fourth for the consideration of petitions of complaint. In these Committees of the Council the modern administrative system may be said to have its origin. But in addition to these formally recognized Committees there was an informal Committee in which we have the germ of the modern Cabinet. Of this, more presently.

Meanwhile, as we have seen, a strenuous attempt had been made by the leaders of the progressive party under the early Stuarts to enforce the legal and political responsibility of the King's Ministers to Parliament. Notably in the case of George Villiers, Duke of Buckingham, when Sir John Eliot was the most conspicuous of his accusers; still more notably in the case of Thomas Wentworth, Earl of Strafford, pursued to his death by John Pym. Eliot had been the friend of Buckingham, Pym the friend of Wentworth, but both had fastened upon the doctrine of ministerial responsibility as the keystone of the arch of constitutional government, and both were resolved to assert that doctrine at all costs. The revival of the practice of political impeachments went far to establish it, and it was clinched by the famous impeachment of Danby (1679). Danby was notoriously the mere agent of the King in the execution of a policy of which he personally disapproved. Yet he was accused of having 'traitorously encroached to himself Regal Power by treating of matters of Peace and War with Foreign Princes and Ambassadors'; of having 'traitor-

ously endeavoured . . . to introduce a tyrannical and arbitrary way of Government'; of being 'popishly affected'; of having 'wasted the King's treasure'; and of having misappropriated money voted by Parliament for the disbandment of the army. Preferred against the King these charges were notoriously true; preferred against Danby they were notoriously false. Danby pleaded in excuse the order of the King expressed in writing, and pleaded also, in bar of an impeachment the King's pardon granted under the Great Seal. Both pleas were set aside, and thus Danby's impeachment is generally and rightly regarded as having gone far towards establishing the principle that 'no minister can shelter himself behind the throne by pleading obedience to the orders of his sovereign. He is . . . answerable for the justice, the honesty, the utility of all measures emanating from the Crown as well as for their legality'.[1]

But impeachment is at best a clumsy weapon. Both in the case of Strafford and in that of Danby, it broke in the hands of those who attempted to work it for more than it was worth. It could properly apply only to offences against the law, and in neither of the crucial cases cited could the Commons secure a conviction. Strafford was enmeshed, but not in the toils of an impeachment. His relentless enemies, in order to catch him, were compelled to have recourse to an Act of Attainder. In Danby's case proceedings were dropped. Pym clearly realized the difficulty, which is stated with admirable explicitness in the *Grand Remonstrance*: 'It may often fall out that the Commons may have just cause to take exception at some men for being Councillors, and yet not charge those men with crimes for there be grounds of diffidence which lie not in proof. There are others, which though they may be proved, yet are not legally criminal.'[2] The only effectual means of

[1] Hallam, ii. 411.
[2] *Grand Remonstrance*, §§ 198, 199.

meeting the difficulty was, as the same document points out, for the King 'to employ such counsellors . . . as the Parliament may have cause to confide in'. In a word, the King's Ministers must become the servants of Parliament. But the time for working out the scheme adumbrated with remarkable prescience by Pym in 1641, had not yet come. Nor was it advanced by the personal ascendancy obtained by Cromwell after the Civil War. The revival of parliamentary authority after the Restoration brought it a stage nearer, and after the Revolution of 1688 the doctrine on which it rested was not seriously disputed.

But at this point it is essential to insist upon a fact which is frequently ignored and still more commonly obscured. *Ministerial* responsibility is not the same thing as *Cabinet* responsibility. In one sense the two principles are actually opposed. Parliament might well have succeeded in substantiating the principle of the legal, and perhaps even the political responsibility of individual ministers without ever evolving the Cabinet system. In America, for example, the President's ministers are responsible and liable to impeachment for offences committed in the discharge of their duties. Whether they are also impeachable 'for bad advice given to the head of the State' is a question which, as Mr. Bryce points out, has never arisen. But, according to the same authority, 'upon the general theory of the Constitution it would rather seem that' they are not.[1] In England the Ministers of State are, as will be shown, both legally responsible for their individual acts, and politically responsible for their collective advice. But the two responsibilities are separable and distinct.

Towards the theory of ministerial responsibility the seventeenth century made a large and important contribution; towards the doctrine of collective Cabinet responsibility it made, in outward form and seeming, none. But the evolu-

[1] *American Commonwealth*, i. 86.

tion of the Cabinet system was none the less steadily though slowly advancing, and to the history of that process we must now return.

The virtual supersession of the Privy Council under Charles II, was regarded by constitutionalists with extreme disfavour, and two attempts were made to arrest the development of the informal Cabinet or Cabal. The first is associated with the name of Sir William Temple, though it is doubtful whether that distinguished diplomatist can be held responsible for the scheme. 'Temple's' Privy Council was to consist of thirty members: fifteen office-holders and fifteen unofficial members of great wealth and political influence. The experiment, though not ill-designed for the purpose of restoring harmony between the King and Parliament, deserved the failure which speedily overtook it. A council of thirty is too small for deliberation, and too large for executive purposes, and things quickly relapsed into the position from which Temple's scheme was intended to extricate them. Within a few months the King was again holding consultation only with a small knot of statesmen. From this practice neither Charles II nor his successors ever afterwards departed. Temple's short-lived experiment had proved itself impotent alike to restore to the Privy Council its constitutional place and importance, or to arrest the development of the convenient but unconstitutional substitute, soon to take form as the Cabinet.

In 1679 the King had bidden farewell to his Privy Council in these significant words: 'His Majesty thanks you for all the good advice which you have given him, which might have been more frequent if the great numbers of the Council had not made it unfit for the secrecy and dispatch of business. This forced him to use a smaller number of you in a foreign committee, and sometimes the advice of some few among them upon such occasions for many years past.' These words are in effect the funeral

oration over the dead body of the Privy Council. This was virtually the end of the old Privy Council as an Executive body.

Meanwhile, the Cabinet developed rapidly. Its evolution was materially assisted by the growth of the party system in Parliament. The origin of that system is commonly ascribed with over-precision to the year 1679. It was then no doubt that the party labels, Whigs and Tories, were first affixed to the two parties which desired respectively the passing and the rejection of the Bill for the exclusion of the Duke of York from the succession. The historic parties, themselves, may more properly be said to originate in the debates of the Long Parliament, and particularly in the discussions on the Grand Remonstrance. But be this as it may, Whigs and Tories, as organized parliamentary parties, were becoming clearly defined by the Revolution of 1688.

For the first years after the Revolution William III selected his Ministers indifferently from the two great party camps. But the expedient, though well meaning, did not work, and in 1695 Sunderland persuaded the King to confide the great offices of State exclusively to the leaders of the Whig party, at that time predominant in Parliament. To this year, and to the formation of the Whig Junto, Macaulay seems to attach an exaggerated importance. Sunderland's *Junto* of 1697 may indeed be regarded as the first homogeneous Ministry, and, as such, it registers an important stage in the evolution of the modern Cabinet. Further, it is the first Cabinet which intentionally reflected the parliamentary majority for the time being. But that evolution was very far from being complete in 1697. The two essential features were still lacking: the Ministry owned no conscious subordination to a common political chief; and the King still presided in person at the meetings of his Cabinet. William III was in fact, as well as in theory, the

head of the Executive Government. Meanwhile, towards the end of his reign a determined and deliberate attempt was made to arrest the progress already made in the direction of Cabinet government and to reconstitute the authority of the Privy Council. Section 3 of the Act of Settlement (1701) enacted 'that . . . all matters and things relating to the well governing of this kingdom which are properly cognizable in the Privy Council by the Laws and Customs of this realm shall be transacted there, and all resolutions taken thereupon shall be signed by such of the Privy Council as shall advise and consent to the same'. The same section further provided 'that no person who has an office or place of profit under the King or receives a pension from the Crown shall be capable of serving as a member of the House of Commons'. Fortunately for the constitutional evolution of England neither of these provisions ever became operative. The first was repealed by Statute (4 & 5 Anne, c. 20, § 27) in 1705; the second was modified so as to permit Ministers of the Crown to seek re-election to the House of Commons after the acceptance of office.

But despite the removal of these obstructions little progress was made with the development of the Cabinet principle under Queen Anne. The Queen had no intention of surrendering to Ministers her personal initiative in matters of State. Like her predecessor she frequently presided at Cabinet Councils, and the policy adopted there was to a large extent her own. But one significant step must be marked. The Queen's sympathies were entirely with the Tory party, and the Whig Ministers who dominated the Council during the middle of the reign were forced upon the Queen, despite her personal inclinations. Particularly was this the case with the appointment of Lord Somers to the Presidency of the Council in 1708. The Queen was not without compensation: the irresponsibility of the

Crown was fully and finally established. 'For some time past', said Rochester in 1711, 'we have been told that the Queen is to answer for everything, but I hope that time is over. According to the fundamental constitution of the kingdom the Ministers are accountable for all. I hope nobody will, nay nobody durst, name the Queen in this connexion.'[1] Nevertheless the Queen continued not merely to reign, but actually to rule. The Ministers were still, although to a diminishing extent, the Ministers of her will; the policy which they pursued was inspired by her personal wishes.

The real point of transition is marked by the accession of the first Sovereign of the House of Hanover. George I was the first 'Constitutional' King of England in the narrower acceptation of that time: he reigned but he did not rule. Henceforward the dividing lines of English history are to be found not in the accession of successive Sovereigns but in the changes of Ministries. For the consummation at this particular juncture of a development which had been long in process two things were in the main responsible: first, George I was a German, with no command of the English tongue and a languid interest in English politics; and next, supreme power fell into the hands of a man of exceptional strength and tenacity of character. To Sir Robert Walpole belongs the distinction of having been the first really to define our Cabinet system, of having been himself the first Prime Minister in the true and complete sense of the term. 'At whatever date', writes Lord Morley of Blackburn, 'we choose first to see all the decisive marks of that remarkable system which combines unity, steadfastness, and initiative in the Executive, with the possession of supreme authority alike over men and measures by the House of Commons, it is certain that it was under Walpole that its ruling principles were first fixed

[1] *Parliamentary History*, vol. vi, p. 972.

in Parliamentary government and that the Cabinet system received the impression that it bears in our own time.'[1] 'It was Walpole', writes another distinguished publicist, 'who first administered the Government in accordance with his own views of our political requirements. It was Walpole who first conducted the business of the Country in the House of Commons. It was Walpole who in the conduct of that business first insisted upon the support for his measures of all servants of the Crown who had seats in Parliament. It was under Walpole that the House of Commons became the dominant power in the State, and rose in ability and influence as well as in actual power above the House of Lords. And it was Walpole who set the example of quitting his office while he still retained the undiminished affection of his King for the avowed reason that he had ceased to possess the confidence of the House of Commons.'[2] We have in this passage an admirably succinct summary of the essential principles on which Cabinet government depends; it remains only to set them forth explicitly and with somewhat greater amplification of detail.

A first essential is the exclusion of the Sovereign. Down to the death of Queen Anne this condition, as we have seen, was not invariably fulfilled. How long it would have remained unfulfilled, whether the Sovereign would ever have been excluded from the meetings of the Cabinet, but for the accidental circumstance that George I had no English, it is impossible to say. It is none the less the fact that the accession of a foreigner to the English throne at a critical moment in our Constitutional development, imparted a decisive bias not to the institutions of this country only but to those of a large part of the civilized world. So long as the Sovereign sat at the Council-board, some degree of political responsibility necessarily attached to him; but the

[1] *Walpole*, p. 142.
[2] Hearn, *Government of England*, p. 220.

irresponsibility of the Sovereign is a condition precedent to the complete responsibility of his servants. During the long administration of Sir Robert Walpole this vital principle was fully and finally accepted.[1]

A second principle, not less important, is the close correspondence between the Cabinet and the Parliamentary majority for the time being. Such correspondence has been a matter of gradual growth and was obviously not possible at all until the definition of the Party system in Parliament. Sunderland's Whig Junto of 1697 was based upon this principle. In deference to the same principle Queen Anne was compelled, much against her inclinations, to admit to her Councils Whig Ministers. Not until the Country returned a Tory majority to the House of Commons in 1710 did the Queen venture to dismiss the Whigs and replace them in office by the Tories. Walpole remained in office so long as he retained the confidence of the House of Commons; but no longer. When he was defeated in 1742 on the question of the Chippenham election he resigned office, and this cardinal principle may be said to have been definitely established. Even George III so far recognized its validity as to lend all his energies to securing a subservient House of Commons, in order that he might retain a Ministry after his own heart.

The principle is now maintained in two ways: first, as we have seen, by requiring that the Cabinet shall reflect

[1] Miss Blauvelt (*Cabinet Government in England*, c. vi, Appendix *a*) mentions the presence of George I at two Cabinet meetings: once, on the authority of Coxe (*Walpole*, vol. i, p. 71), when evidence was laid before the Cabinet implicating Wyndham in a Jacobite plot; and secondly, after the landing of the Pretender in Scotland in 1715, in reference to which Townshend writes to Stanhope: 'The Lords of the Cabinet Council, his Majesty being present, did' &c. Sir William Anson (*Law of the Constitution*, ii. 38) says that Todd also mentions three occasions on which the King has been present at a Cabinet Meeting since the accession of George I; but he adds, 'as exceptions from the established rule they are wholly unimportant.'

the political colour of the majority in Parliament; and, secondly, by the rule that all members of the Cabinet shall be members of one or other House of the Legislature. This rule is not absolute. In 1880 Sir William Harcourt, when Secretary of State for the Home Department, found himself temporarily without a seat in Parliament. The same fate befell Mr. Goschen when appointed Chancellor of the Exchequer in 1887. And there have been other and more recent instances of the temporary exclusion of Cabinet Ministers from Parliament. More striking because more deliberate was the refusal of Mr. Gladstone to seek re-election at Newark when appointed by Sir Robert Peel to the Colonial Secretaryship in December 1845. As a result he was, though a leading member of the Cabinet, out of Parliament during the difficult and momentous Session of 1846. But these are exceptions which prove a rule, now firmly established. It is noticeable that under the written Constitution of the Australian Commonwealth there is no room for exceptions. Section 64 of the Commonwealth Act of 1900 provides that: 'After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a Senator or a member of the House of Representatives.' With this may be contrasted Section 6 of the Constitution of the United States: 'No person holding any office under the United States shall be a member of either House during his continuance in office.' Australia has chosen to follow the practice of England; the United States preferred the theory of Montesquieu.

Closely connected with the principle of correspondence between the Executive and the parliamentary majority is a third principle: that of the political homogeneity of the Cabinet. It is obvious, indeed, that if the members of the Cabinet are to reflect the political colour of the parliamentary majority, they must themselves be drawn from the

same political party. But this, like other principles now deemed essential to Cabinet Government, was only established by slow degrees. The earlier ministries of Queen Anne, and many of the Cabinets of George III, were eminently composite.

So long as this was the case, a fourth principle must necessarily have remained embryonic: that of collective responsibility. For many years the responsibility of members of the Cabinet was individual and departmental. So late as 1806 Lord Temple maintained this view: 'The Cabinet was not responsible as a Cabinet, but the Ministers were responsible as the officers of the Crown.'[1] Walpole strongly favoured the opposite view, and did his best to enforce it upon his colleagues. He dismissed various colleagues who opposed his Excise Bill, but even he found it necessary to repudiate the suspicion that they were dismissed on that account: 'Certain persons,' he declared, 'had been removed because his Majesty did not think best to continue them longer in Service. His Majesty has a right so to do, and I know of no one who has a right to ask him, What doest thou?' On another occasion the King sent for the Duke of Newcastle and reproached him for opposition to the policy of the Cabinet to which he belonged. 'As to business in Parliament', he said, 'I do not value the opposition, if all my servants act together and are united; but if they thwart one another, and create difficulties to the transaction of public business then indeed it will be a different case.'[2] But thwart each other they not infrequently did. The doctrine of departmental responsibility died hard; that of Cabinet responsibility developed slowly. At what precise point in our history it can be said to have been definitely established,

[1] Quoted by Anson (op. cit., p. 119), who shows that the responsibility here referred to was *legal* responsibility sanctioned by the process of impeachment: not moral responsibility sanctioned by public opinion

[2] Blauvelt, pp. 237, 238.

it is difficult to say. Professor Hearn—an authority entitled to high respect—is inclined to regard the second Rockingham ministry—that of 1782—as 'the first of modern ministries', from the point of view of collective responsibility and corporate unity. For the first time the new ministry came in as a body 'on the distinct understanding that measures were to be changed as well as men, and that the measures for which the new Ministry required the Royal consent were the measures which they, while in opposition, had advocated'. So lately as 1763 the elder Pitt had been baulked in a similar attempt. When negotiations were opened with him for the formation of a ministry he demanded the removal of all the ministers who had supported the Peace of 1763, and insisted that he and his friends must 'come in as a party'. No demand could have been more distasteful to George III, and Pitt's terms, which at the time were regarded as wholly extravagant, were unequivocally declined. Rockingham effected unprecedented changes in the personnel of the administration when he formed his first ministry in 1765. 'I do not remember in my times', writes Lord Chesterfield, 'to have seen so much at once as an entire new Board of Treasury and two New Secretaries of State *cum multis aliis*.'[1] It is clear, therefore, that the principle of Cabinet solidarity was gaining ground rapidly in the eighteenth century; whether Professor Hearn is strictly accurate in assigning to a specific date the final and complete establishment of the principle is more open to doubt. This at least must be said, that if we accept 1782 as a definite date we must continue to admit exceptions as proving a rule. But be this as it may, no one will deny that the existing doctrine of the Constitution is accurately interpreted in a classical passage by Lord Morley of Blackburn.

'As a general rule,' he writes, 'every important piece of departmental policy is taken to commit the entire Cabinet, and its members stand or fall together. The Chancellor of

[1] Hearn, *Government of England*, pp. 212, 213.

the Exchequer may be driven from office by a bad dispatch from the Foreign office, and an excellent Home Secretary may suffer for the blunders of a stupid minister of war. The Cabinet is a unit—a unit as regards the Sovereign, and a unit as regards the Legislature. Its views are laid before the Sovereign and before Parliament, as if they were the views of one man. It gives its advice as a single whole, both in the royal closet, and in the hereditary or representative chamber. . . . The first mark of the Cabinet, as that institution is now understood, is united and indivisible responsibility.'[1]

With this famous and authoritative passage from the pen of Lord Morley we may compare the even more authoritative utterance of his late chief. 'As the Queen', said Mr. Gladstone, 'deals with the Cabinet, just so the Cabinet deals with the Queen. The Sovereign is to know no more of any differing views of different ministers than they are to know of any collateral representation of the monarchical office; they are an unity before the Sovereign, and the Sovereign is an unity before them.' And again: 'While each Minister is an adviser of the Crown, the Cabinet is an unity, and none of its members can advise as an individual, without, or in opposition actual or presumed to, his colleagues.'[2]

The solidarity of the Cabinet depends largely upon the fifth and last of the essential principles on which the institution rests—the ascendancy of the Prime Minister. In the whole English Constitution there is nothing more characteristically English than the position of this great functionary. The Prime Minister is the political ruler of England, but not until 1905 was his position recognized in the table of social precedence, and it is still doubtful whether there is an

[1] *Life of Walpole*, pp. 155, 156.

[2] *Gleanings*, i. 74, 242. With Gladstone's view we must compare the very remarkable correspondence between Queen Victoria and Lord Granville with reference to Foreign Policy in 1859 and 1864. Granville was Lord President of the Council, Palmerston Premier, and Lord John Russell Foreign Secretary. The Queen's mistrust of the two latter is obvious. Cf. Fitzmaurice, *Granville*, ii. 349 and 456–9.

'office' of Prime Minister. The point is amusingly illustrated by an incident in the life of Lord Palmerston. The latter when visiting the Clyde in 1863 was received with great enthusiasm. 'The captain of the guardship, anxious to do honour to the occasion, was hindered by the fact that a Prime Minister was not recognized in the code of naval salutes; but he found an escape from his dilemma in the discovery that Lord Palmerston was not only First Lord of the Treasury, but also Lord Warden of the Cinque Ports, for which great officer a salute of nineteen guns was prescribed—an apt instance', as Mr. Ashley adds, 'of the minor anomalies of the Constitution under which we live.'[1]

An incident which took place in the House of Commons so lately as May 3, 1906, is in this connexion not without significance. Mr. Paul, member for Northampton, had given notice of a question to be addressed to the First Lord of the Treasury. On his rising to put the question the following instructive dialogue took place:

MR. PAUL. 'Before putting this question, Mr. Speaker, may I ask for your ruling? Whenever I put down a question addressed to the Prime Minister that name is struck out at the table and the words "First Lord of the Treasury" substituted. I understood that the King had been pleased to confer the style and title of Prime Minister, with appropriate precedence, on the head of his Government, and that that was now the proper official designation of the right hon. gentleman. I have observed that you yourself, sir, have made use of it. Perhaps you will be good enough to say for the information of the House and the table whether I rightly apprehend the significance of his Majesty's most gracious act?'

The SPEAKER. 'If I am asked to decide on the spur of the moment I should say that Prime Minister was the proper designation.'

MR. PAUL. 'I beg most respectfully to thank you for your reply and to ask the Prime Minister the question of which I have given notice.'

SIR H. CAMPBELL-BANNERMAN. 'I hope my hon. friend

[1] Ashley, *Life of Lord Palmerston*, ii. 233.

will find that the rose by either name will give the same answer.'

Two years before (1904), Mr. Balfour was asked in the House of Commons 'whether he was aware of any such official recognized by law as the Prime Minister'? He had already answered the question by anticipation in a speech at Haddington:[1] 'The Prime Minister has no salary as Prime Minister. He has no statutory duties as Prime Minister, his name occurs in no Acts of Parliament, and though holding the most important place in the Constitutional hierarchy, he has no place which is recognized by the laws of his country. That is a strange paradox.' Some part of the paradox has been removed by the assignment to the Prime Minister of a precedence between the Archbishop of York and the premier Duke, and the title now frequently appears in official documents.[2] The Prime Minister has at last got a social position, is it certain that he has even now got a political position? This at any rate may be said without fear of contradiction. It is still so far true that there is no 'office' of Prime Minister, that no one could, by usage, be Prime Minister, or sit as such in his own Cabinet, unless he held simultaneously some recognized office. This office is commonly that of First Lord of the Treasury. To this Mr. Gladstone, following the precedent of Pitt and Canning, added on two occasions that of Chancellor of the Exchequer. Lord Salisbury, when Prime Minister, was for several years also Secretary of State for Foreign affairs, and later was Lord Privy Seal. Lord Rosebery took the office of Lord President of the Council. The precise office assumed by the Prime Minister, in addition to his own, matters not; but without such an office he would receive no salary, and, until

[1] Quoted by Sidney Low, *Governance of England*, p. 153.

[2] Thus in the *London Gazette*: at the Council Chamber, Whitehall, the 10th day of May, 1910. By the Lords of his Majesty's Most Honourable Privy Council. Present: Archbishop of Canterbury, Archbishop of York, Prime Minister, Lord Privy Seal, Mr. Secretary Churchill. It is this day ordered, &c.

lately, would have enjoyed no precedence. 'Nowhere in the wide world', says Mr. Gladstone, 'does so great a substance cast so small a shadow; nowhere is there a man who has so much power, with so little to show for it in the way of formal title or prerogative.' [1]

It is the holder of this paradoxical position who forms and maintains in being the Cabinet. The Prime Minister is, in Lord Morley's words, 'the keystone of the Cabinet arch.' The phrase is as precise as it is picturesque. The keystone keeps the arch together; it depends for its position on the arch. To the evolution of the office of Prime Minister some words, therefore, may properly be devoted.

Where are we to look for the protoplasm of this vigorous germ? At most periods of English history there has been a person who had many of the attributes of a Prime Minister of the Crown. Ralph Flambard under William II; William Longchamp under Richard I; Hubert Walter under King John; William of Wykeham who resigned in consequence of an adverse vote in Parliament in 1371; Wolsey and Thomas Cromwell under Henry VIII; William Cecil, Lord Burleigh, under his imperious daughter; Edward Hyde, Lord Clarendon, in the years immediately succeeding the Restoration—all these had some of the attributes of a modern Prime Minister, but they lacked, still more noticeably, the essential characteristics. They had no necessary or continuous connexion with Parliament, and they had none with a Cabinet or Council of Ministers. They were servants of the King; holding office solely at his pleasure and responsible to him. Clarendon, it is true, was impeached by the Commons; but his fall was due primarily to the fact that he had lost the favour of the Crown; and we must recall the warning already given against the confusion between the legal responsibility of an individual minister, and the moral responsibility of a collective Cabinet. Nevertheless, Clarendon's career marks the beginning of the period of

[1] *Gleanings*, i. 244.

transition. Danby was even more like a modern Prime Minister; but he was not the head of the Cabinet. In Somers we find a still closer resemblance, but William III was still in every sense of the word master in his own Cabinet. So long as that lasted there could be no Premier in the modern sense. Queen Anne strove gallantly to maintain the position of the Crown; but Godolphin's ascendancy brings us a step nearer the modern system: still, no man as yet had been Prime Minister of England. Sir Robert Walpole clearly was, and with him the earlier stages in the evolution of the office may be said to be complete. Walpole is the master of the Cabinet; his colleagues are his subordinates and nominees. He is also leader of the House of Commons, and when the House withdraws its confidence he ceases to be Prime Minister. At last we are obviously in a modern atmosphere. But there is much characteristic jealousy of the new departure. Clarendon undoubtedly interpreted aright the prevalent sentiment when in 1661 he refused the suggestion of the Duke of Ormond that he should resign the Chancellorship and be content to advise the King on questions of general policy. 'He could not consent', he replied, 'to enjoy a pension out of the Exchequer under no other title or pretence but being First Minister, a title so newly translated out of French into English that it was not enough understood to be liked, and everyone would detest it for the burden it was attended with. Roger North says that Jefferies was at one time 'commonly reputed a favourite and next door to premier minister.'[1] Swift frequently describes Harley as Prime Minister, and in the preface to the *Last Four Years of Queen Anne* refers to 'those who are now commonly called Prime Ministers among us'. But the new title, perhaps by reason of its Gallic origin, made slow way towards general acceptance in England. It was one of the most serious accusations against Walpole that he made himself 'sole minister' and 'Prime Vizier'. A Protest of dissentient Peers,

[1] *Lives of the Norths*, p. 354, ap. Blauvelt.

outvoted on the motion to remove Walpole, declared in 1741 that 'a sole or even a first minister is an officer unknown to the law of Britain, inconsistent with the constitution of this country, and destructive of liberty in any Government whatever'. Sandys declared in the House of Commons: 'We can have no sole and Prime Minister. We ought always to have several Prime Ministers and officers of State.' But more remarkable than the accusation is the defence. So far from justifying the usage Walpole repudiated the title and the office. 'I unequivocally deny that I am sole and Prime Minister and that to my influence and direction all the affairs of Government must be attributed. . . . I do not pretend to be a great master of foreign affairs. In that post it is not my business to meddle, and as one of His Majesty's Council I have but one voice.' From a real Prime Minister such a declaration would be simply amazing; it affirms not the modern English doctrine, not the idea of Cabinet responsibility, but that of American departmentalism. Far different is the view taken of his office by the younger Pitt. In conversation with Melville in 1803 he dwelt 'pointedly and decidedly upon the absolute necessity there is in this country that there should be an avowed and real minister, possessing the chief weight in the Council and the principal place in the confidence of the King. In that respect (he contended) there can be no rivalry or division of power. That power must rest in the person generally called the First Minister'. The office, perhaps, reached its zenith in the person of Sir Robert Peel. He was, says Lord Rosebery, 'the model of all Prime Ministers. It is more than doubtful, indeed, if it be possible in this generation, when the burdens of Empire and of office have so incalculably grown, for any Prime Minister to discharge the duties of his high post with the same thoroughness or in the same spirit as Peel . . . Peel kept a strict supervision over every department: he seems to have been master of the business of each and all of them . . . it is probable that no Prime

Minister ever fulfilled so completely and thoroughly the functions of his office, parliamentary, administrative, and general as Sir Robert Peel.'[1] Mr. Gladstone's testimony is to the same effect: 'Nothing of great importance is matured or would even be projected in any department without his personal cognizance.' But Peel himself was clearly becoming conscious that his own conception of his great office was 'becoming impossible of realization, except by sending all Prime Ministers to the House of Lords'[2]—a solution to which he personally refused to assent. Mr. Gladstone declared that 'the Head of the British Government is not a Grand Vizier'. Lord Rosebery hints that Mr. Gladstone, in his first Ministry of 1868, may have occupied a position equal to Peel's, but he declares with emphasis—and not without knowledge—that the position of a modern Prime Minister is very different. He is merely 'the influential foreman of an executive jury'; he has 'only the influence with the Cabinet which is given him by his personal arguments, his personal qualities and his personal weight'.[3] Lord Rosebery writes, of course, with great authority, but it would not be wise to lay too much stress upon a constitutional *dictum* obviously coloured by recent personal experience obtained under circumstances which were perhaps exceptional.

But whatever be the position of a Prime Minister in relation to his Cabinet colleagues, there is no ambiguity in his relation to the general machinery of the State.. Backed by a stable and substantial majority in Parliament, his power, as Mr. Low truly says, is greater than that of the German Emperor or the American President, 'for he can alter the laws, he can impose taxation and repeal it, and he can direct all the forces of the State. The one condition is that he must

[1] Rosebery, *Sir Robert Peel*, pp. 27–9.

[2] 'I defy the Minister of this country to perform properly the duties of his office . . . and also sit in the House of Commons eight hours a day for 118 days.' Peel, *Papers* (ed. Parker), iii. 219.

[3] Rosebery, *Peel*, pp. 32, 33. The whole passage is one of extraordinary interest, but the warning in the text should not be neglected.

keep his majority, the outward and concrete expression of the fact that the nation is not willing to revoke the plenary commission with which it has clothed him.'[1] The Prime Minister occupies in fact a fourfold position: he is (to put it at the lowest) the chairman of the Executive Council; he is the leader of the Legislature; he is indirectly the nominee of the political sovereign or electorate, and finally he is, in a special degree, the confidential adviser of the Crown and the ordinary channel of communication between the Crown and the Cabinet. 'He reports to the Sovereign', says Mr. Gladstone, 'its proceedings, and he also has many audiences of the august occupant of the Throne. He is bound, in these reports and audiences, not to counterwork the Cabinet; not to divide it; not to undermine the position of any of his colleagues in the Royal favour. If he departs in any degree from strict adherence to these rules, and uses his great opportunities to increase his own influence, or pursue aims not shared by his colleagues, then unless he is prepared to advise their dismissal he not only departs from rule, but commits an act of treachery and baseness. As the Cabinet stands between the Sovereign and the Parliament, and is bound to be loyal to both, so he stands between his colleagues and the Sovereign and is bound to be loyal to both.'[2]

Such is the position of the Prime Minister of to-day; the resultant of a lengthy process of political evolution. And the advent of the modern Prime Minister has meant, by general consent, the exit of the pre-revolution Monarchy.

There remains to be asked, however, one question of some nicety, if not of delicacy. To what extent has the actual political power of the Crown suffered total eclipse? What rights does the personal Sovereign still retain? To this question it is obvious that there can be no answer either final or complete. In a constitution so entirely flexible as our own much must depend upon the personal equation. We are warned by Lord Rosebery that it is so even in the

[1] Op. cit., p. 47. [2] *Gleanings*, i. 243.

case of the Prime Minister. Much more so must it be true of the occupant of the Throne. There, too, personal character must tell with overwhelming effect; and there, as we are beginning to learn from various authoritative sources, it has told during the last half century.

There is, however, one weapon left in the armoury of the Crown, the importance and reality of which are alike incontestable. The King has the right of appeal from Parliament to the masters of Parliament, from his own advisers to the political Sovereign before the expression of whose deliberate will the legal Sovereign must bow. This right the King would be compelled to exercise if he were unable to find a Ministry willing at once to accept responsibility for his acts and at the same time able to secure and retain the confidence of the House of Commons. But it is a weapon which he would hesitate except in the last resort to employ. And for an obvious reason. An adverse verdict would create a situation almost intolerable. The position of the King would be that of a master who has given notice to servants and has been compelled by circumstances to retain them on their own terms. The books used to teach that William IV ventured to employ this weapon against the Whigs in 1834, when having dismissed the Melbourne Ministry he dissolved Parliament in the hope of securing a majority for Sir Robert Peel. But the incident is capable of other explanations and the Melbourne Papers make it clear that the Prime Minister was, to say the least, a consenting party. On the other hand, the King would be equally within his constitutional right in appealing to Parliament against his Ministry. This would in effect be done by refusing a dissolution of Parliament to a retiring Ministry.[1]

A third right which still belongs incontestably to the Crown is the selection of a Prime Minister.[2] The choice is, of course,

[1] Several such instances have occurred in the Dominions: for which see Keith, *Self Government*, pp. 42 seq.

[2] This right was hotly contested by the Rockingham Whigs, circ. 1782.

very narrowly limited in practice, but it is not denied that, within such limits, the discretion permitted to the Crown is a real one.

But infinitely more important than such formal rights still vested in the Crown are the informal rights, or rather the opportunities enjoyed by the Sovereign in virtue of his position. Kings are mortal, but they are not ordinary mortals; a glamour attaches to their position and person which even the stoutest and most self-assured democrats find irresistible. The sentiment thus inspired may be unworthy or the reverse; but it is idle to deny that it exists, or that it gives the Sovereign an initial advantage in dealing with any Minister, however powerful. Bagehot enumerates three rights possessed by the King: 'the right to be consulted, the right to encourage, the right to warn.' 'A King of great sense and sagacity would want,' he adds, 'no other.' The *Letters* of Queen Victoria afford innumerable illustrations of her insistence upon these rights. It was the violation of her right to be consulted which brought Lord Palmerston into trouble during his third tenure of the Foreign office, and which really led to his abrupt dismissal in 1851. His indiscretion in regard to the *coup d'état* of Prince Louis Napoleon would hardly have been visited with punishment so condign, had he not already forfeited the confidence of the Queen and perpetually ignored the warnings of the Prime Minister.

'The Queen,' so ran the famous memorandum of 1850, 'requires, first, that Lord Palmerston will distinctly state what he proposes in a given case, in order that the Queen may know as distinctly to what she is giving her royal sanction. Secondly, having once given her sanction to such a measure that it be not arbitrarily altered or modified by the minister. Such an act she must consider as failing in

The latter contended that the King must accept the nominee of the party leaders. On this cf. *Autobiography of the third Duke of Grafton* (pp. 324, 355, 359), edited by Sir W. Anson. The editor (note p. 324) says: 'The theory was not reasonable nor warranted by the needs of Constitutional Government.'

sincerity towards the Crown, and justly to be visited by her Constitutional right of dismissing that minister. She expects to be kept informed of what passes between him and foreign ministers before important decisions are taken based upon that intercourse; to receive the foreign despatches in good time; and to have the drafts for her approval sent to her in sufficient time to make herself acquainted with their contents before they must be sent off.'

The demand, though explicit, was entirely reasonable, and Lord Palmerston justly suffered a temporary humiliation, for the lack of consideration he displayed towards the Sovereign. That he had a strong personal regard for the Queen, and a high respect for her intellect, we have his own testimony to prove: but he was inclined to treat her as an elderly family solicitor occasionally treats a young lady client: 'Of course, my dear young lady, you can read these documents if you like, but you won't understand them if you do, and you will save yourself trouble and me time if you sign at once.' The Queen, as is clear from her correspondence, strongly resented this attitude on the part of her minister; and properly. She enforced her claim to be *consulted*.[1]

Her right to *encourage* was perpetually exercised. Her letters to Peel in the midst of the struggle for the repeal of the Corn Laws afford one of many illustrations. She had started with considerable prejudice against the 'odd shy man', with a manner 'how different, how dreadfully different to that frank, open, natural, and most kind warm manner of Lord Melbourne', as she herself wrote. But Peel soon won her complete confidence and that of the Prince Consort, and in his fight for Free Trade, he was not a little cheered by the encouragement of the Sovereign. Thus, in January 1846, the Queen wrote to express her 'great satisfaction' at Peel's success in persuading his colleagues to accept the principle of his policy, 'feeling certain that what was so just and wise must succeed.' On February 4 she wrote again saying 'she is sure that Sir Robert will be rewarded in the

[1] Cf. note to p. 83.

end by the gratitude of the country. This will make up for the abuse he has to endure from so many of his party.' On the 17th Prince Albert writes to Peel: 'Allow me to tell you with how much delight I have read your long speech of yesterday. It cannot fail to produce a great effect, even upon a party which is determined not to listen to the voice of reason.' This is followed on the next day by a note from the Queen herself, enclosing an equally flattering one from the Duchess of Kent to her daughter: 'The Queen must write a line to Sir Robert Peel to say how much she admired his speech.' Such letters and many like them, attest the meticulous attention bestowed by the Queen upon passing events in the sphere of domestic policy. Not less close and continuous is her interest in foreign policy; and not less marked is the encouragement given to her Ministers during periods of national stress, such as the Crimean War. No detail is too small or unimportant to engage the personal attention of the Sovereign: the supply of ammunition or transport accessories; the exact disposition of the armaments; hospital comforts for the sick or wounded, and so forth. On these points and such as these she inquires of the Secretary for War. To the Prime Minister, Lord John Russell, she writes to express 'her sense of the imperative importance of the Cabinet being *united*, of one mind, at this moment, and not to let it *appear* that there are differences of opinion within it'.

But if she was generally ready to encourage, she did not hesitate to reproach. Thus in 1858 she wrote to Lord Derby a letter which by itself would suffice to prove how justly tenacious she was of the royal prerogative: 'The Queen,' she writes, 'was shocked to find that in several important points her Government have surrendered the prerogative of the Crown. . . . The Queen must remind Lord Derby that it is to him, as the head of the Government, that she looks for the protection of those prerogatives which form an integral part of the Constitution.' With Lord Palmerston, in the

midst of the Mutiny crisis, she is much more seriously angry. In her opinion—and she was undeniably right—Palmerston underrated the gravity of the situation, and to the Queen, far more than to the Minister, the nation owed the timely dispatch of adequate reinforcements. Illustrations of the judicious and opportune intervention of the Sovereign might be multiplied almost indefinitely. That on some occasions the Queen's action was inspired by the Prince Consort is an indubitable fact, but, in this connexion, is nothing to the point. One notable instance of the Prince's diplomatic tact may, however, be mentioned. When the Prince was on his death-bed in 1861, England and America came within measurable distance of war over the *Trent* affair. Opinion in England was seriously aroused about the detention of Slidell and Mason, and Lord John Russell accurately interpreted that opinion. *Punch* depicts him as squaring up to President Lincoln with the words 'give them up or fight'. His dispatch sent down for the approval of the Queen is said to have been conceived somewhat in the tone of *Punch's* cartoon. The Prince's emendations, without in the least diminishing its firmness, afforded Lincoln a golden bridge for retreat from an indefensible position.[1] Lincoln had the sense and courage to cross it; the situation was saved, and war was averted—averted, no one can doubt, by the fact that the Minister's draft dispatch had to undergo the scrutiny of a royal diplomatist whose tact and judgement were ripened by a continuous experience of affairs, such as no Minister can possibly, under our party system, hope to enjoy. The Sovereign is in fact, as regards Foreign affairs, a permanent Civil Servant with opportunities for acquiring a knowledge of things and more particularly of men such as no Civil Servant, immersed in the routine of a great office, and no diplomatist touching affairs only at a single point, ever has or can acquire.

But it is not only in Foreign affairs that there is room for

[1] Cf. Martin, *Life of the Prince Consort*, v. 418–26.

the exercise of diplomatic tact on the part of the Sovereign. On two notable occasions in the latter part of her reign Queen Victoria is known to have intervened with success to avert a conflict on questions of eminent importance between the two Houses of the Legislature. The first was in regard to the disestablishment and disendowment of the Irish Church in 1869. The Queen's personal sentiments in this matter were opposed to those of her Ministers; but never for an instant did she deflect her course from that prescribed to the most rigid of 'constitutional' Sovereigns. Loyalty to her Ministers; perfect appreciation of the bearings of the political situation; realization of the fact that the House of Commons in passing the Bill by large majorities reflected the sentiments of the Constituencies; above all, perhaps, anxiety to avert a conflict *à outrance* between the two Houses;—all these things combined to induce the Queen to mediate between the Government and their opponents in the House of Lords. With this object General Grey, the Queen's secretary, addressed the following letter to Archbishop Tait and sent a copy to the Prime Minister:—

'Mr. Gladstone is not ignorant, (indeed the Queen has never concealed her feeling on the subject) how deeply her Majesty deplores the necessity, under which he conceived himself to lie, of raising the question as he has done; or of the apprehensions of which she cannot divest herself, as to the possible consequences of the measure which he has introduced. These apprehensions, her Majesty is bound to say, still exist in full force; but considering the circumstances under which the measure has come to the House of Lords, the Queen cannot regard without the greatest alarm the probable effect of its absolute rejection in that house. Carried, as it has been, by an overwhelming and steady majority through a House of Commons, chosen expressly to speak the feeling of the country on the question, there seems no reason to believe that any fresh appeal to the people would lead to a different result. The rejection of the bill, therefore, on the second reading, would only

serve to bring the two Houses into collision, and to prolong a dangerous agitation on the subject.'

The Peers passed the second reading by a majority of 33, and Mr. Gladstone gratefully acknowledged, as well he might, the efficacy of her Majesty's 'wise counsels'. His own feelings are vividly depicted in a letter to the Queen.

'Mr. Gladstone would in vain strive to express to your Majesty the relief, thankfulness, and satisfaction with which he contemplates not only the probable passing of what many believe to be a beneficent and necessary measure, but the undoubted signal blessing of an escape from a formidable constitutional conflict.'[1]

Not less memorable and not less effective was the Queen's intervention in regard to another threatened conflict between Lords and Commons, in 1884. The circumstances are relatively recent and need no elaborate rehearsal. Of all the Reform Bills of the nineteenth century that of 1884 was the largest in its scope. The Lords were determined, and most properly, to refuse their assent to so wide an extension of the electoral franchise, unless they were previously reassured as to the lines of the coming Bill for the redistribution of Seats. The case was eminently one for compromise; but an impartial arbitrator was needed to bring the parties together. The invaluable intermediary was found through the good offices of the Crown; both sides were exhorted to moderation; and in the event Mr. Gladstone had every reason 'to tender his grateful thanks to your Majesty for the wise, gracious, and steady influence on your Majesty's part, which has so powerfully contributed to bring about this accommodation, and to avert a serious crisis of affairs'. The delicate tact demanded from a conciliator in matters of such high moment it requires little imagination to conceive. But it can be fully appreciated only on perusal of the story in detail.[2]

[1] Morley, *Life*, ii. 278.

[2] For which cf. Morley's *Gladstone*, vol. iii, pp. 129–39; and Lang, *Life of Lord Iddesleigh* (Popular edition), p. 352.

It is not likely that we shall ever be able to define with precision the sphere within which the personal will of the Sovereign operates; but the 'materials' now rapidly accumulating do enable us to perceive that a 'Constitutional King' is not synonymous with *un roi fainéant*; that despite the evolution of the Cabinet system; despite the responsibility of Ministers and the irresponsibility of the Sovereign; despite the dominance of Party and the rigid non-partisanship of the Crown, there does remain to the latter a sphere of political action which, if wisely left undefined, nevertheless has been and may be of incomparable value to the nation as a whole. On this point the testimony of Mr. Gladstone is at once eloquent, emphatic, and conclusive, and justifies quotation in full:—

'Although the admirable arrangements of the Constitution have now completely shielded the Sovereign from personal responsibility they have left ample scope for the exercise of a direct and personal influence in the whole work of government. The amount of that influence must greatly vary according to character, to capacity, to experience in affairs, to tact in the application of a pressure which never is to be carried to extremes, to patience in keeping up the continuity of a multitudinous supervision, and, lastly, to close presence at the seat of government; for in many of its necessary operations, time is the most essential of all elements and the most scarce. Subject to the range of these variations, the Sovereign, as compared with her Ministers, has, because she is the Sovereign, the advantages of long experience, wide survey, elevated position, and entire disconnexion from the bias of party. Further, personal and domestic relations with the ruling families abroad give openings, in delicate cases, for saying more, and saying it at once more gently and more efficaciously, than could be ventured in the more formal correspondence, and ruder contacts, of Governments. . . . There is not a doubt that the aggregate of direct influence normally exercised by the Sovereign upon the counsels and proceedings of her Ministers is considerable in amount, tends to permanence and solidity of action, and confers much benefit on the country without in the

smallest degree relieving the advisers of the Crown from their individual responsibility. . . . The acts, the wishes, the example of the Sovereign in this country are a real power. An immense reverence and a tender affection await upon the person of the one permanent and ever faithful Guardian of the fundamental conditions of the Constitution. She is the symbol of law, she is by law, and setting apart the metaphysics, and the abnormal incidents of revolution, the source of power. Parliaments and Ministers pass, but she abides in lifelong duty; and she is to them as the oak in the forest is to the annual harvest in the field.'[1]

Has the sphere of the Sovereign's direct and personal political activity tended to widen or contract in recent years? To this question no authoritative answer can at present be given; nor, if it could, would it be discreet to give it. One point, however, is clear and may be stated without indiscretion or reserve. Of the *formal* executive powers of the Crown there has been in these last years an amazing increase. This has been due to several causes: partly, to the abnormal legislative activity of Parliament, partly to multiplication of the functions and responsibilities of the State, and, partly, to the increasing tendency to legislation by delegation. Acts of Parliament are now frequently mere *cadres*, which are vivified, by the consent and intention of Parliament, by the several administrative departments. This, as an acute American critic of our Institutions[2] has pointed out, has very largely increased the formal executive powers of the Crown. Another fact still more important is equally indisputable. The Crown has in these last years acquired a new function and significance as the centre and symbol of Imperial unity. If to the term 'political' we give the circumscribed connotation common to the publicists of the last generation, we might be disposed to agree with President Lowell that 'as a political organ it (the Crown) has receded into the back-

[1] *Gleanings*, i. 41–3.
[2] Lowell, *Government of England*.

ground'.[1] Bagehot, and other mid-Victorian writers lived in the hey-day of the Manchester School; when the weary Titan groaned beneath the weight of Imperial responsibilities which were light compared to those of to-day; when men asked querulously how long 'those wretched Colonies' were 'to hang like a millstone round our necks'; while as yet the imagination of the English people was wholly untouched by the idea of Imperial solidarity. To them, therefore, 'political' activity could signify nothing but pre-occupation with the permutations of party government at home.

But in the last thirty years ideas have changed in this matter with amazing rapidity. Our conception of the 'political' sphere has broadened. The political activities and influence of a British ruler are now bounded only by the globe. The Empire inherited by King George V is a totally different thing from that which William IV handed on to Queen Victoria. The actual centre of political gravity is shifting; the domestic politics of Great Britain, even her European relations, are shrinking into true perspective; and, as a result, a new sphere of influence and activity is opening out before the occupant of the Throne:—

> The loyal to their Crown
> Are loyal to their own fair sons who love
> Our ocean Empire with her boundless home,
> For ever broadening England, and her throne
> In one vast orient, and one isle, one isle
> That knows not her own Greatness.

The obverse is equally true. The loyalty of the over-sea Dominions is evoked not by an institution but by a person;[2] not by a Parliament, imperial only in name, but by an Emperor-King. In a word, the Crown has become, in an especial sense, the guardian and embodiment of a new idea—the sentiment of Imperial Unity.

[1] *Government of England*, i. 49.

[2] Cf. *Times*, Dec. 28, 1910. 'The settled attitude of politicians in all the Great Dominions nowadays is to profess complete indifference to the fortunes of parties in England, and on the other hand to redouble their professions of devotion to the Crown.'

CHAPTER V

THE EXECUTIVE: (3) PERMANENT: THE CIVIL SERVICE, AND THE GOVERNMENT DEPARTMENTS

'It is not the business of a Cabinet Minister to work his department. His business is to see that it is properly worked.'—SIR GEORGE CORNEWALL LEWIS (quoted by Bagehot).

'Of all the existing political traditions in England, the least known to the public, and yet one of those most deserving attention, is that which governs the relation between the expert and the layman.'—PRESIDENT LOWELL.

THERE is nothing in the practical working of our Constitution which to the 'intelligent foreigner' is so amazing as the part played in it by amateurs. That the War Office should be controlled by an eminent newsvendor, the Admiralty by a city merchant or a lawyer from the Temple, the Board of Trade by a University 'don' or a landowning Peer, and the Treasury by a country gentleman seems, to detached observers, to be an anomaly such as only an anomaly-loving people could endure. The explanation is to be found in the aphorism of Sir George Cornewall Lewis, that 'it is not the business of a Cabinet Minister to work his department. His business is to see that it is properly worked'. Englishmen believe in the association of the amateur and the expert, of the parliamentary 'chief' and the permanent official; in a word, in the combination of the Cabinet and the Civil Service.

The two preceding chapters have dealt with the formal Executive—the Crown, and the political Executive or Ministry. This will be devoted to the permanent Executive, and to the practical working of the several Departments of the Central Government. It is indeed the existence and efficiency of the Civil Service, and the good under-

standing which prevails between the political and permanent heads of departments which have rendered possible the development of a system so repugnant to *a priori* ideas of orderly and precise administration.

An English Cabinet Minister acts in a fourfold capacity: he is an adviser of the Crown; he is a Parliamentary and Party leader; he is a member of the political Committee which rules the United Kingdom and the British Empire, and finally he is, with few exceptions, the head of an administrative department.

A modern Ministry generally includes the following officials: the Prime Minister, the Lord High Chancellor, the Lord President of the Council, the Lord Privy Seal, the First Lord of the Treasury, the First Lord of the Admiralty, the Chancellor of the Exchequer, the Chancellor of the Duchy of Lancaster, the Postmaster-General, the Secretary for Scotland, the First Commissioner of Works, the Chief Secretary to the Lord Lieutenant of Ireland, five Secretaries of State—for Home affairs, Foreign affairs, Colonies, War, and India; and four Presidents of Committees of the Council—the Boards of Trade, Agriculture, Education, and Local Government. The above at present (1910) constitute the Cabinet; but the Cabinet, though including twenty-one officials, has only nineteen members. The Prime Ministership is, as we have seen, invariably combined with another office; generally, as now, with the First Lordship of the Treasury. Other offices may be combined in one person. Thus, at present, the Secretaryship for the Colonies is held by the Lord Privy Seal. Nor do all the above offices invariably carry with them the right of admission to the Cabinet. The Chief Secretary for Ireland, the First Commissioner of Works, the Postmaster-General, the various Presidents of Boards have at times, during the last five and twenty years, been excluded from the Cabinet. On the other hand, the Lord Chancellor of Ireland and the

Lord Lieutenant were both included in one or more of the late Lord Salisbury's Cabinets. In addition to the two last named, the following are also included in the Ministry, although they have never been admitted to the Cabinet: the Financial Secretary to the Treasury, the Patronage Secretary, and three Junior Lords of the Treasury; the Parliamentary Under-Secretaries to the Home, Foreign, War, Colonial, and India Offices, to the Boards of Trade, Local Government, Education, and Admiralty; the Civil Lord of the Admiralty; the Paymaster-General,[1] Assistant-Postmaster-General, the Attorney and Solicitor Generals for England and Ireland, the Scottish Lord Advocate and the Solicitor General for Scotland, and the Financial Secretary of the Army Council. The above Ministers constitute the political Executive, and all of them may, most of them must have seats in Parliament. They are party-leaders who go into and out of office, according to the mutations of party majorities in the House of Commons. It is rare for any one Minister to hold any one office continuously for more than five or six years. Even if his own party is returned for a second tenure of office the individual Minister is not unfrequently shifted from one office to another. The Earl of Halsbury and Lord Ashbourne held the Lord Chancellorships of England and Ireland respectively for a continuous period (broken only by one three-years' interval) of twenty years; but such instances are rare, and likely to become rarer. A 'Minister' is, always, a bird of passage through the department over which he temporarily presides, and generally of rapid passage. Parliamentary Government, Disraeli was wont to say, would be impossible but for the recess. A parliamentary Executive would be impracticable were it not for the existence of a permanent Civil Service.

[1] The Paymaster-General was sometimes in the Cabinet: e.g. Lord J. Russell in 1832; Sir E. Knatchbull in 1841; Macaulay in 1846; and Lord Granville (1851); but Granville was, I think, the last.

This Service may, in the widest sense of the word, be said to include all permanent employés of the Government, from the Permanent Under-Secretary for Foreign or Home Affairs, with his £2,000 a year, down to a Post-Office sorter. Throughout this Service there are two dominant principles—amounting in some cases to rules: permanence of tenure (during good behaviour), and abstention from party politics. Under an Act of 1705 and many subsequent Acts all 'placemen', with the exception of holders of certain high political posts, were excluded from Parliament; while partly by Service regulations, partly by convention, civil servants are required to abstain from all participation in party politics. An Act of 1710 rendered liable to fine and dismissal any Post-Office official who shall 'by Word, Message or Writing or in any other manner whatsoever endeavour to persuade any elector to give or dissuade any elector from giving his vote for the choice of any person . . . to sit in Parliament'. An Act of 1782 disfranchised Revenue officers. Out of 160,000 electors no fewer than 11,500 were at that time officers of Customs and Excise, and no fewer than seventy elections were said to be dependent upon their votes.[1] With a franchise largely extended the difficulty has been minimized, and an Act of 1868 removed the disqualifications imposed in 1782, while Police officers were for the first time enfranchised in 1887. But the danger, though mitigated, has not been entirely removed. It has indeed in late years been emphasized, partly by the enormous extension of Government activities and the consequent multiplication of Government employés, and partly by the growth of the principle and habit of trade-association. The danger is, so far, most clearly apparent in the dockyard constituencies where high political considerations are commonly said to be subordinated to trade questions of hours, wages, and conditions of employment. The members for

[1] Erskine May, i. 348.

'dockyard' boroughs are, says Lord Courtney, 'habitually recognized in the House of Commons for their zeal on behalf of the dockyardsmen.' This may be inevitable, but it raises large questions not easily dismissed. The agitation among the employés of the Post Office affords another symptom of the same disease. The Postal and Telegraph Service now employs about 200,000 persons, and as an impartial observer remarks, 'it is not difficult to perceive that such a power might be used in directions highly detrimental to the State. There is no reason to expect the pressure to grow less, and mutterings are sometimes heard about the necessity of taking away the franchise from Government employés. That', adds President Lowell, 'would be the only effective remedy, and the time may not be far distant when it will have to be considered seriously.'[1] When it is, the difficulties encountered in the daughter-lands, and the ingenuity with which, in one instance, they have been met, will deserve and doubtless will receive attention.[2]

How are the members of this great Civil Service recruited? Only during the last half century have Civil Service appointments been placed on a satisfactory basis. Down to that time the principle of private political patronage prevailed, and it was not entirely eliminated until 1896.[3] Qualifying examinations for candidates were instituted in the thirties; in 1854 the Civil Service of India was thrown open to competition, and the same principle was, with very few exceptions, applied to the Home Civil Service in 1870. Since that time the higher ranks of both Civil Services have been recruited from some of the best brains in the United Kingdom. Men of the highest ambition and enterprise may still prefer to seek their fortunes in fields where the prizes, if more precarious, are more dazzling; but every year Govern-

[1] *Government of England*, i. 153. [2] Cf. *infra*, pp. 278 sq.

[3] The present writer has himself nominated to local Post-masterships on the invitation of the Patronage Secretary to the Treasury, and the practice was, down to 1896, familiar to every Member of Parliament.

ment employment appears to offer increasing attractions to the very best of the young men who go forth from the Universities. Within the Service there are grades, which constitute virtually water-tight compartments. Recruiting for the different grades is from a different intellectual, if not a different social class. A very few of the highest posts may still be filled by nomination; in more there is a combination of nomination and competitive examination; but the enormous mass of appointments are given exclusively on the results of an examination which is both open and competitive. The posts thus opened include: (1) Upper Division Clerkships, with pay varying as a rule from £150 a year to £1,000, and leading up to an Under-Secretaryship with £2,000 a year; (2) Second Division Clerkships, whose work is strictly clerical and whose pay ranges from £70 to £300 a year. Below these again are the Assistant Clerks, and 'Boy' Clerks.[1] As a rule the clerks, of whatever grade, continue in the particular office or Department to which they are at first appointed. Of these Departments it is now necessary to say something.

Their origins are singularly diverse. The most important of all—the Treasury—is directly descended from the *Curia Regis*, and is therefore of hoary antiquity. Five of the Chief Departments: the Foreign, Home, Colonial, War, and India Offices represent the differentiation of the duties of the Secretary of State. Three others: the Boards of Trade, Agriculture, and Education represent Committees of the Privy Council.

The Treasury is, as regards its chief officers, 'in commission.' The office of Lord High Treasurer dates from the reign of William I, by whom a 'Treasurer' was appointed to preside over the 'Scaccarium' or Exchequer, and in particular to receive the accounts of the Sheriffs. The last holder of this great office of State was the Duke of Shrewsbury, appointed by Queen Anne a few days before her death.

[1] *Civil Service Year Book*, 1910.

George I nominated Lord Halifax and four other persons to be Lords Commissioners for executing the office of Lord High Treasurer, and in Commission the office has remained ever since that time (1714). The duties are nominally apportioned among five persons: the First Lord, who has generally, though not invariably, combined this office with the Premiership; three Junior Lords, who now act as the Party Whips, but have no duties,[1] save purely formal ones, at the Treasury; and the Chancellor of the Exchequer. This last functionary, who was brought into being under Henry III as an assistant to or check upon the Lord High Treasurer, is now the working head of the Department. The 'Board' was still a reality down to the close of the eighteenth century, but like other Boards (e. g. the Board of Trade), though regularly constituted, has long since ceased to meet. The Treasury, however, is still in many respects the most important Department of the Central Government, since it exercises or ought to exercise a strict control over the rest. Not a penny of the sums apportioned by Parliament to the various services can legally be spent without a warrant signed by two Lords of the Treasury. It is the Treasury, moreover, which has to find the money by taxation and otherwise, and, consequently, all estimates must be passed by the Treasury before being subordinated to the House of Commons by the Ministers more immediately responsible. Under the Cabinet system, however, the responsibility for expenditure, as for everything else, is collective, and, should the Cabinet decide that a certain expense must be incurred, the Treasury has no option but to find the money. The Chancellor of the Exchequer, if he deems the expenditure unjustifiable, has one means of protest, but one only—that of resignation. In 1887 Lord Randolph Churchill resolved on this method of protesting against the expenditure

[1] They occasionally 'represent' a Department, otherwise unrepresented in the House of Commons.

on armaments; the Prime Minister decided in favour of the Admiralty and the War Office, and Lord Randolph Churchill's resignation was consequently accepted. But the protests of the guardian of the national purse do not often go so far as this. The threat is frequently uttered but rarely carried out. Lord Palmerston declared that his desk was full of Mr. Gladstone's resignations, but, in his case, matters were always in the long run adjusted. On one occasion, however, when the tone of the Chancellor of the Exchequer was more than ordinarily menacing, Lord Palmerston wrote to Queen Victoria: 'Viscount Palmerston hopes to be able to overcome his [Mr. Gladstone's] objections; but if that should prove impossible, however great the loss to the Government by the retirement of Mr. Gladstone, it would be better to lose Mr. Gladstone than to run the risk of losing Portsmouth or Plymouth.' Both the threatened disasters were for the time being averted; but the story illustrates vividly enough the relations which may subsist between a Chancellor of the Exchequer and his colleagues of the Cabinet. Mr. Gladstone was perhaps mindful of his own earlier experience, when at a later stage of his career he elected to combine the offices of First Lord of the Treasury, Prime Minister, and Chancellor of the Exchequer. In view of the control which the Treasury ought to exercise over the 'spending Departments', and the intimate knowledge which its Chief ought to possess of their requirements, there is much to be said for this arrangement. But with the rapid expansion and growing complexity of the nation's business the experiment is one which is hardly likely to be repeated.

We may next pass to the Departments presided over by His Majesty's Principal Secretaries of State. Of these there are now five, any one of whom may legally perform (most of) the duties of the rest. All these high officials derive from an officer who was originally of humble rank, the King's

'Clerk' or 'Secretary'. From the time of Henry VIII this official was invariably a member of the Privy Council, and the same King in 1539 appointed a second Secretary of co-ordinate rank and powers with the first. The Secretaries were 'to keep two seals, called the King's Signets, to seal all warrants, writings, &c., both for inward and outward parts, as had been accustomed'. These seals are still the symbols of the Secretarial office, and legally necessary for the performance of many of their functions. The office of Secretary steadily gained in consideration and importance, and towards the end of Elizabeth's reign Sir Robert Cecil appears as 'Our Principal Secretary of Estate'. A third Secretary of State (for Scotland) was added after the Union in 1708, but in 1746 the number was again reduced to two. A third Secretaryship (this time for the Colonies) was established in 1768, only to be abolished after the recognition of American independence in 1782. The exigencies of the struggle with France brought a third Secretary (for War) into existence in 1794, and the Colonies were added to his Department in 1801. The Crimean War led to the assignment of responsibility for Military and Colonial affairs to two separate Secretaries in 1854, and the transference of the dominions of the East India Company to the Crown raised the Secretariat to five in 1858. The history of the Secretariat, thus briefly summarized, affords the clue to the history of the Departments over which the five Secretaries severally preside. Generally speaking the five Secretaries are, in law, indistinguishable; power is conferred by State upon '*the* Secretary of State' (i.e. any *one* of them) or upon 'one of His Majesty's Principal Secretaries of State' (again, i.e., any *one* of them). Some Statutes, however, assign powers to the Secretary of State for a particular Department. During the eighteenth century, until 1782, the work of the Joint Secretaries was geographically differentiated. The Secretary for the Northern Department was responsible for dealings with

Northern Europe: communications with Germany, Holland, Denmark, Sweden, Russia, Poland, and Flanders; the Secretary for the Southern Department for dealings with France, Spain, Italy, and Turkey, as well as Home affairs and those of Ireland and the Colonies. In 1782 the work was reorganized. The Northern Department was transformed into a Foreign Office; the Southern into a Home Office, responsible also for Ireland and the few Colonies which survived the great disruption of 1782.

The existing functions of the Home Office, complex and multifarious, are, in largest part, due to the feverish legislative activity of the nineteenth century. The Home Secretary is now responsible for the magistracy (except their appointment and removal—functions of the Lord Chancellor), for the Police, for prisons, factories, and mines, and is the adviser of the King in regard to the prerogative of mercy. Ireland still remains technically within the purview of his Department. On the one side, therefore, he performs the functions of a Minister of Justice and Police; on the other of a Minister of Industry. The classification of duties is anything but scientific, and if ever the reorganization of the Departments of the Central Government should be taken seriously in hand the Home Office would be transformed out of recognition. Of all Cabinet Ministers, except the Premier, the Home Secretary comes most into personal contact with the Sovereign. He is still, *par excellence*, *the* Secretary of State; but though the Home Secretary takes precedence of the other Secretaries, the office is not infrequently confided to one of the least experienced members of the Cabinet.[1]

Less miscellaneous but even more responsible are the duties assigned to the Foreign Secretary. Easily under-

[1] Instances in point are: Mr. R. A. (now Viscount) Cross, the very successful 'dark horse' of Mr. Disraeli's great Administration (1874–80), and Mr. Henry Matthews (now Viscount Llandaff), Lord Salisbury's Home Secretary (1886–92).

stood, they call, however, for no detailed description. The Foreign Secretary stands in a special relation to the King. By tradition the King has always played a more direct part in the direction of Foreign than in that of Home affairs. As long as the great States maintain the monarchical form this must inevitably be the case. Ambassadors are accredited personally to Sovereigns, though in England they are introduced to the King by the Secretary of State. All important dispatches to Foreign Governments are submitted to the Sovereign, whose assent is not merely formal.

Upon the observance of this rule Queen Victoria inflexibly insisted, and the neglect of it practically cost Lord Palmerston his place when he was almost at the zenith of his popularity in the country (1851). Nor can it be doubted that the custom has contributed both to the continuity and the success of our foreign policy. The less our diplomacy is deflected from its traditional lines by party mutations at home, the better for this country and for its neighbours. Happily there are not wanting signs that Foreign affairs are coming to be regarded, in increasing degree, as outside the domain of party politics. This is partly the cause and partly the effect of the continuously exercised intervention of the Sovereign. But one point must be emphasized. No whit of responsibility attaches to him, any more than to the permanent Under-Secretary. Influence they both exercise in full measure; the Secretary of State alone bears responsibility.

Next in seniority to the Home and Foreign Secretariats is that for the Colonies. The history of the office is instructive. On the reorganization of the Privy Council after the Restoration Charles II created a Council of Trade and a Council of Foreign Plantations. These Councils were combined in 1672, but the combined Council existed only for three years. In 1695 William III revived it as the 'Board of Trade and Plantations'. By this Board the Colonies or

Plantations were administered, so far as the casual control exercised down to 1768 could be described as 'administration'. By that time we were already involved in acute controversy with the American Colonies, and it was thought desirable to create a third Secretaryship of State to deal with Colonial affairs. In 1782 the most important part of the Colonial Empire had ceased to be; the separate Secretaryship was abolished, and the residue of work was in 1783 transferred to the Home Office. In 1801 Colonial business was transferred once again to the new Secretary of State for War, created, as we have seen, in 1794. The new Department henceforward became known as that for War and the Colonies, until in 1854 a separate Secretaryship for the Colonies was created. From that time onwards the office steadily grew in prestige and importance until, in 1895, it received a fresh access of dignity by being selected as the special sphere of his activities by the most prominent of the leaders of the Party then in power. The work of the office will come under review in a later chapter,[1] but it may be said at once that it is not responsible for all the over-sea territories of the Crown. India has its separate Secretariat; various Protectorates—notably Egypt—are controlled by the Foreign Office, while the Channel Islands and the Isle of Man are under the jurisdiction of the Home Office.

The history and organization of the War Office must not detain us; partly because few civilians can be trusted to apprehend it with accuracy and describe it with lucidity; still more because, of all the great offices of State, it has known least of continuity, and never appears to reach any semblance of stability. The system, therefore, which is described with tolerable accuracy to-day, may be completely out of date to-morrow. A few words, therefore, must suffice.

The Army has always been in a peculiar sense under the

[1] Chapter xv.

control of the Crown. The command of it was, as a competent writer has observed, 'the last of the royal prerogatives to be brought under the principle of ministerial responsibility.'[1] This was due partly to the anxiety of the Crown to retain it; still more perhaps to the reluctance of Parliament to admit that a standing army was anything more than a disagreeable and temporary expedient, to be dispensed with as soon as circumstances permitted. Circumstances have obstinately forbidden such a desirable consummation, but the War Office, which was first organized under Charles II, has generally been conspicuous for the confusion and maladministration which are naturally to be expected in an organization designed for temporary purposes. The confusion which characterized this Department down to 1855, and did not entirely cease in that year, is thus happily summarized by Sir William Anson: 'The soldier was fed by the Treasury and armed by the Ordnance Board: the Home Secretary was responsible for his movements in his native country: the Colonial Secretary superintended his movements abroad: the Secretary at War took care that he was paid, and was responsible for the lawful administration of the flogging which was provided for him by the Commander-in-Chief.'[2]

The office of Secretary at War dates from the reign of Charles II, but until the definition of his functions by an Act of 1783 his position was ambiguous. Like a Secretary of State he countersigned State documents and thus authenticated the sign-manual of the King; but he was not technically a Secretary of State, and in 1717 Pulteney—when fulfilling the office—formally repudiated his responsibility to Parliament. He was, he contended, 'a ministerial, not a constitutional officer, bound to issue orders according to the King's direction.' In 1783 the ambiguity was so far

[1] Traill, *Central Government*, p. 95.
[2] *Constitution*, ii. 375.

terminated that the Secretary at War was entrusted under Statute with definite functions—largely financial—to be performed under parliamentary sanction and responsibility. In 1793 the King surrendered the personal command of the armed forces to a General Commanding in Chief, and a year later (as already described) a Secretaryship of State for War was established.

From 1794 to 1887 the Commander-in-Chief and the Secretary for War occupied joint thrones, located at the Horse Guards and the War Office respectively. The dual control thus established over the Army, and prolonged by the fact that the Commander-in-Chief was almost invariably a Royal Prince, was not terminated until 1887, when by Orders-in-Council the whole administration of the Army was confided to the Commander-in-Chief. Simultaneously that officer was himself made responsible to the Secretary of State. In 1895 the Duke of Cambridge was induced to resign the office which throughout a great part of his cousin's reign he had filled, and in 1904, after the Boer War, the office, having subsisted for a little more than a century, was abolished.

Meanwhile the Secretaryship of State for War had emerged as a differentiated and substantive office. Constituted in 1794, its functions were confused in 1801 by the absorption of colonial business, and still more by the continued existence of the Secretary at War. But the War and Colonial Secretaryships were bifurcated in 1854; in 1855 the Secretary of State for War took over the duties of the Secretary at War, and the latter office was finally abolished in 1863. Meanwhile the control of the Commissariat was transferred from the Treasury to the War Office, the Board of Ordnance was abolished and its duties similarly transferred, and at the same time (1855) the War Office absorbed the Army Medical Department. Gradually order was being evolved out of chaos and the War Office was coming into its own. Since 1855 internal reorganizations have been not

infrequent, but they have mostly tended in one direction. Control and responsibility have alike been concentrated in the Secretary of State, until at last in 1904 his great rival finally disappeared. The Secretary for War, like the First Lord of the Admiralty, now obtains technical advice from a Board of professional experts. This Army Council now includes, in addition to the Secretary of State, the Parliamentary Under-Secretary and the Financial Secretary; the Chief of the General Staff; the Adjutant-General; the Quartermaster-General; and the Master-General of the Ordnance.

The fifth and last of the Secretariat-Departments is the India Office. In certain respects, to be noticed presently, the organization of this office is unique. Down to 1784 British India was ruled by the directors of a commercial company acting under Charter from the Crown and (since 1773) controlled to some extent by Parliament. The India Act passed by Pitt in 1784 established a dual control: it left the powers of the Company untouched as regards commercial affairs, but it transferred political responsibility to a Board of Control, consisting of six Commissioners, all of whom were to be Privy Councillors, and among whom were always to be the Chancellor of the Exchequer and one of the Principal Secretaries of State. The Court of Directors was at the same time given power to appoint a Secret Committee of three members, through whom the orders of the Board of Control were transmitted to India. From 1784 onwards the President of the Board of Control (almost invariably a Cabinet Minister) was virtually a Secretary of State for India, and controlled Indian administration with the assistance of the Secret Committee.

The formal change to the modern system was effected after the Mutiny. By an Act of 1858 British India was formally transferred to the Crown, and it was provided that 'all the powers and duties then exercised or performed by

the East India Company . . . should in future be exercised and performed by one of Her Majesty's Principal Secretaries of State'. For this purpose a fifth Secretaryship was, as we have seen, created. But the Secretary is, in theory at any rate, not a complete autocrat at the India Office. And this constitutes the peculiarity of his position. He appoints, and is assisted by, a Council—the Council of India, which must be carefully distinguished from the Viceroy's Council, the latter appertaining to the local government of India. The former consists of fifteen members, of whom nine must have recently served or resided for ten years in India. Members of the Board are ineligible for seats in the House of Commons. They are all paid and meet weekly. This is no phantom Board like that of the Treasury, or the Trade or Education Boards. It is an integral part of the Government of India, without whose advice the Secretary of State cannot, except in matters of secrecy or inquiry, act, and who in certain important cases have actually a power of veto. Apart from this Council the internal organization of the India Office, with its permanent secretaries, clerks of the first and second division, and so forth, differs only in detail from the rest of the executive Departments of the central Government.

The Admiralty, to which we next turn, is not a Secretariat but a Board representing, like the Treasury, a great and ancient office. The office of Lord High Admiral dates from the fourteenth century, but the duties were from time to time performed by commissioners, and the office has been continuously in commission ever since 1708.[1] The Board of Admiralty now consists of six Lords Commissioners of the Admiralty, a Financial Parliamentary Secretary, and a Permanent Secretary. The responsible minister is the First Lord, who is a member of the Cabinet, and, almost invariably,

[1] Except in 1827, when the Duke of Clarence held the office of Lord High Admiral.

a civilian.[1] He is assisted in Parliament by a Civil Lord and a Financial Secretary, while his expert advisers at the Board are four naval officers of high rank. The First Sea Lord is responsible for the strategy and discipline of the Fleet; the Second, for recruiting and education; the Third is Controller of the Navy and responsible for Naval construction, repairs, dockyards, ordnance, and stores; the Fourth, for transport, victualling, and coaling. Finance is in the hands of the Parliamentary Secretary. The Board meets at least once a week, and is in a very real sense responsible for the first line of National Defence, though in a technical and parliamentary sense the First Lord has undivided responsibility.

Another office generally included among the *Executive* offices is that which is presided over by the Postmaster-General. The Royal Post dates from the sixteenth century, the office of Postmaster-General from 1710. Created after the enactment of the Place Bill of 1707, the Postmaster was excluded from a seat in the House of Commons, until he was rendered eligible, subject of course to the usual rule as to re-election on acceptance of office, by a Statute of 1866. He is always a member of the Ministry, and not infrequently of the Cabinet. Party exigencies; the desirability of conciliating various groups and interests; the necessity for rewarding good party men; the difficulty of combining in the ranks of the Government oratorical and administrative skill; of securing at once departmental efficiency, and platform plausibility—all this points to an inevitable increase in the size of Cabinets. But it is doubtful whether the tendency makes either for coherence in general policy or for efficiency of administration.

Apart from the considerations just suggested, there seems to be no sufficient reason for the inclusion in the Cabinet of such an officer as the Postmaster-General, and there would be much to be said for his exclusion from Parliament. His

[1] This was not the case in the eighteenth century, and Lord Derby's First Lord in 1852 was an admiral—the Duke of Northumberland.

work lies, or ought to lie, quite outside the ordinary domain of party politics. He is a great revenue collector; but so are the Chairmen of Inland Revenue and of the Customs Board. He is more. He not merely collects but earns revenue. He is the head of a great commercial undertaking; he is a large banker and the organizer of a vast system of communication and transport. The work, however, is largely of a routine character, and though men like Henry Fawcett have conferred distinction upon the office, it is not one which demands either high political imagination, or first-rate commercial aptitude. A good average business man can do efficiently all that is demanded of him.

The success of the Post Office is nevertheless frequently utilized as an argument in favour of the extension of the trading activities of the State. Without entering upon highly controversial ground, three things may be said: first, that the success of the Post Office, though respectable, is neither phenomenal nor unquestioned; secondly, that so far as it is substantial, it is attained under the protection of a rigid monopoly; and, thirdly, that those who desire to found upon it arguments for further experiments must prove that private management would not yield better results, as regards public convenience, commercial profit, initiative, and adaptability. This would be no easy task.

We pass next to two Boards which represent Committees of the Privy Council. Of these the oldest is the Board of Trade, which, as we have seen, was originally established in the reign of Charles II. After a somewhat chequered history it was reconstituted with a regular official staff in 1786 as a Committee of Council for Trade. The Board now consists of a President and the following *ex officio* members: the First Lord of the Treasury, the Secretaries of State, the Chancellor of the Exchequer, the Archbishop of Canterbury, and the Speaker of the House of Commons. Its powers, however, can be and are exercised by a Presi-

dent who is almost invariably a Cabinet Minister. Its functions, which are regulative and not directly executive, represent multifarious activities. The Board supervises Railways, Harbours, Fisheries, Lighthouses, and Merchant Shipping; it collects and publishes statistics as to the employment of labour; it controls the new Labour Exchanges, and superintends the working of the Bankruptcy Law.

Precisely parallel to the position of the Board of Trade is that of the Board of Education. Down to the year 1899 the supervision of Education was still in the hands of a Committee of the Privy Council, with the Lord President of the Council at its head. The working head of the Department was, as a rule, the Vice-President of the Committee of Council on Education, who was sometimes, but not invariably, a Cabinet Minister. In 1899 the Committee was reconstituted as a Board under a President of its own, and now controls the ever-expanding work of Elementary and Secondary Education, so far as these are provided or assisted from Parliamentary funds. It has also taken over the educational work of the Charity Commission and has charge of some of the Metropolitan museums—notably that at South Kensington.

The functions of the Local Government Board will be noticed later.[1] But here it may be said that the Board, under its present name, was constituted in 1871, primarily to carry on the work of the Poor Law Board, but also to take over from the Home Office and the Privy Council respectively the supervision of the work entrusted to local bodies by innumerable Statutes in regard to public health and cognate matters. Its immediate progenitor, the Poor Law Board, was constituted in 1847 to carry on the work entrusted by the Poor Law of 1834 to a board of non-Parliamentary Commissioners. The President of the Local Government Board is now invariably a member of the Ministry, and

[1] Cf. Chapters xii and xiii.

generally of the Cabinet. As a recognition of the importance of the work entrusted to him, his salary has recently (1910), like that of his colleague at the Board of Trade, been brought up to that of a Secretary of State—£5,000 a year.

The Board of Works became a separate entity in the year 1851. Until that time the royal palaces, parks, and some public buildings were maintained by the Commissioners of Woods and Forests, the body which is responsible for the management of the Crown Lands. The 'Board' is constituted on the model of the Board of Trade, and, like it, is a phantom body, the duties being performed by a First Commissioner, who is eligible for a seat in Parliament, is invariably included in the Ministry, and sometimes in the Cabinet. Why he should be, apart from the reasons already considered in the case of the Postmaster-General, it is not easy to say.

The Board of Agriculture was constituted in 1889, under the presidency of a Parliamentary Chief, to take over certain duties from the Privy Council and the Land Commissioners. Its general function is to promote the interests of agriculture, and more specifically to deal with such matters as tithe commutation, the enfranchisement of copyhold, allotments, enclosure of commons, and the improvement of landed estates held by limited owners.

There are a few other offices the political heads of which are invariably members of the Ministry, if not always of the Cabinet. Of these it is necessary to speak shortly.

The Irish Executive is formally vested in the Lord-Lieutenant in Council, i. e. in the Privy Council of Ireland. The formal medium of communication between the Sovereign and the Lord-Lieutenant is still the Home Secretary. But, as a rule, the Lord-Lieutenant's position is that of a 'constitutional' representative of a Constitutional Sovereign. The real ruler of Ireland, the officer responsible to the Imperial Parliament for the conduct of Irish affairs, is the Chief

Secretary to the Lord-Lieutenant. This official is, under statute, Keeper of the Irish Privy Seal, President of the Irish Local Government Board, and Home Secretary for Ireland in one. If, as is sometimes the case, the Lord-Lieutenant has a seat in the Cabinet, the Chief Secretary has not, and under these circumstances he takes, in fact as well as name, a secondary position. More commonly the positions are reversed: the Chief Secretary is the real, the Lord-Lieutenant the nominal head of the Irish Executive. But Ireland still retains its own governmental apparatus: its own Privy Council, Administrative officers, Law officers (Chancellor, Attorney, and Solicitor-General), and courts of law, the last being subject to the appellate jurisdiction of the House of Lords.

Scotland retains less of the apparatus of independence. Not until 1885 was there even a separate Secretary for Scotland. In that year, however, it was deemed advisable to hand over to a new official created by Act of Parliament certain administrative duties hitherto performed by the Treasury, the Home Office, the Local Government Board, and notably the Committee of Council on Education. The Secretary for Scotland is Keeper of the Great Seal of Scotland, but is not technically a Secretary of State. Scotland retains (subject, like Ireland, to the Supreme Court of Appeal at Westminster) its own judicial system and its own law officers, a Lord-Advocate and a Solicitor-General. The Lord-Advocate is not only the chief law officer, corresponding to the English Attorney, but also acts as Parliamentary Under-Secretary to the Home Office for Scotch business.[1] If the Secretary, as often happens, is a peer, the Lord-Advocate represents the Scotch office in the Lower House.

The Chancellor of the Duchy of Lancaster is another official usually included in the Cabinet, but for personal, not

[1] Anson, *Constitution*, ii. 200.

for administrative reasons. He is practically a 'Minister without portfolio', a statesman unwilling to submit to the strain of departmental work, but whose advice in the Cabinet his colleagues are anxious to secure. He is formally responsible for the management of the extensive landed property of the Duchy of Lancaster. This is the private property of the Sovereign as Duke of Lancaster, and is not surrendered with the other hereditary revenues in return for the Civil List. The Chancellor keeps the Seal of the Duchy and is paid out of its revenues, which yield to the Crown £60,000–£70,000 a year net. Judicially, the Chancellor is represented by a Vice-Chancellor, who presides over the Chancery Court of the Duchy, which also possesses its own Attorney-General. The Chancellor himself appoints the County Court judges and magistrates in the Duchy.

I have reserved to the last three of the most historic and the most dignified officials of the central Government: the Lord Chancellor, the Lord Privy Seal, and the Lord President of the Council.

The Lord Chancellor, who is invariably a member of the Cabinet, occupies a fourfold position. He presides in the House of Lords; he is the head of the Judiciary; the head of an important Department; and the chief legal adviser of the Government. In the last capacity he is assisted by the 'law officers', the Attorney and Solicitor-General. The manifold duties of the Chancellor, judicial, legislative, and administrative strikingly exemplify the lack of differentiation incidental to the period in which the Chancellor's office had its origin. Of all the great officers of State, that of the Chancellor is the oldest, dating from the reign of Edward the Confessor. The Chancellor (so named from the *cancelli* or the screen behind which the secretaries sat to transact business[1]) was the chief of the King's secretaries and chaplains, the 'keeper of the King's

[1] Stubbs, i. 352.

conscience', and custodian of the King's Great Seal. He was a prominent member of the King's Council, a baron of the Exchequer, but primarily the head of a secretarial department, the Chancery. His chief rival, the Norman Justiciar, disappeared at the end of Henry III's reign, and thenceforward the Chancellor was indisputably the leading Minister of the Crown, the 'Secretary of State for all departments', at any rate until the sixteenth century. Of his place in the judicial system I propose to speak later.[1] Down to the reign of Edward III the office was invariably and naturally held by an ecclesiastic; the first lay Chancellor being Robert Bourchier, appointed in 1340. From the sixteenth century the political importance of the office somewhat declined owing to the development of the secretariat; but the Chancellor still takes precedence next after the Archbishop of Canterbury, and his office remains not merely one of the highest dignity, but of the greatest importance. Apart from his own judicial duties, the Chancellor is responsible for the appointment of judges,[2] magistrates, and counsel learned in the law; he is patron of many of the King's livings, visitor of the King's Hospitals and Colleges, and head of the Crown Office in Chancery, whence many important writs still issue, e.g. those for the election of Members of Parliament. It should be added that the Chancellorship is one of the few offices still subject to a religious disability. It cannot be held by a Roman Catholic.

The office of Lord Privy Seal has been since 1884 merely a sinecure; but it is an historic office still held, with appropriate precedence, by a member of the Cabinet, frequently *in commendam* with another office, and without emolument. His-

[1] Cf. Chapter xiv.

[2] The Chancellor appoints Judges of the High Court, Justices of the Peace and County Court judges; but not the Lords Justices of Appeal, nor the Law Lords nor stipendiary magistrates.

torically the office is interesting, since it played a really important part in the development of the principle of ministerial responsibility. It dates back at least as far as the fourteenth century, and may have been intended as a check upon the growing power of the Chancellor. Any way, by the sixteenth century it has become part of the regular administrative routine that 'documents signed by the King's own hand, and countersigned by the Secretary, are sent to the Keeper of the Privy Seal, as instructions for documents to be issued under the Privy Seal; and these again serve as instructions for the Chancellor to issue documents bearing the Great Seal of the realm. This practice begets a certain Ministerial responsibility for the King's acts'.[1] But all legal necessity for the use of the Privy Seal was definitely abolished by Statute in 1884.

The Lord President of the Council is another official of the highest dignity, who has been deprived of the most important of his administrative functions by comparatively recent changes noticed in the preceding pages. The conversion of the Committee of Council into a Board of Education in 1899 was the last and most serious blow. The establishment of the Board of Agriculture was another, less recent and less serious. The Lord President is still nominally a member of many phantom Boards, but apart from his position as a member of the Cabinet, in which he invariably sits, his functions have shrunk with the fortunes of the historic Privy Council, of which he is the official head. At meetings of the Council he sits invariably on the right hand of the Sovereign.

These meetings are frequent, but only in a formal sense are they important. It is the King-in-Council who issues Proclamations and Executive Orders. It is in the Council that newly appointed Bishops do homage to the King for the temporalities of their Sees; that Ministers take the

[1] Maitland, p. 203.

official oath, kiss the King's hand, and from him receive the insignia of office; that Sheriffs are still 'pricked'. Numberless executive acts still require to be done in Council, and to be attested by the signature of the Clerk. Maitland[1] enumerates six different kinds of powers delegated by Parliament to the Privy Council: the power to lay down general rules, e. g. as to the administration of workhouses; to issue particular commands, e. g. to a recalcitrant local authority; to grant licences; to remit penalties; to order inspection; to order inquisitions, e.g. as to a railway accident. But in the performance of these functions, though the parent Council remains the formal authority, the real and originating authority is vested in one of the numerous daughter departments to which the Council has given birth.

The Council now consists of some three hundred persons. Among them are all Cabinet Ministers, present and past; and other officers of State; the two Archbishops and the Bishop of London; a large number of Peers, including practically all those who have held high administrative posts at home and abroad; a certain number of the highest judges and ex-judges; a few colonial statesmen, and a large number of persons whom for political, literary, scientific, military, or other services the Sovereign (or his Minister) desires to honour. Except on the demise of the Crown and some ceremonial occasions, only a few members of the Council are summoned, the customary quorum being three.[2] But the Council has a great history behind it, and should certain imperialist dreams be fulfilled, may have a great future before it.

[1] Op. cit., p. 407.

[2] The Council which met on May 7, 1910, to proclaim the accession of King George V, was attended by over 140 persons, among them, according to precedent, being the Lord Mayor and representatives of the City of London.

CHAPTER VI

THE LEGISLATURE: (1) THE HOUSE OF LORDS: ITS ORIGINS AND EARLY HISTORY

'The power and jurisdiction of Parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court, he adds, it may be fairly said, "Si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima." It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms.'—BLACKSTONE'S *Commentaries*.

'A majority in a single assembly, when it has assumed a permanent character—when composed of the same persons habitually acting together, and always assured of victory in their own House—easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another constituted authority. The same reason which induced the Romans to have two consuls, makes it desirable there should be two chambers: that neither of them may be exposed to the corrupting influence of undivided power, even for the space of a single year.'—JOHN STUART MILL.

FROM whatever point of view it be regarded, the English Legislature is the most interesting and the most important in the world. In point of antiquity incomparable; in jurisdiction the most extensive, and in power unlimited. Competent and at all times called upon to legislate for one-fourth of the human race, Parliament—or more technically 'the King in Parliament'—recognizes no domestic authority superior to itself. It is, in a word, Sovereign, in all matters

ecclesiastical as well as temporal, within the dominions of the King.

In this and the following chapters I propose to discuss the place of the Legislature in the English Constitution; to analyse its structure, to sketch its history, and to describe its functions. In order more clearly to appreciate the outstanding features of our own Legislature, I shall also compare it with the Legislatures of other great States of the modern world.

It will be found convenient, as well as scientific, to consider the structure and functions of the two Houses separately; but before proceeding to this task there are two outstanding features of the English Parliament as a whole to which particular attention must be drawn.

The first is that of the legal omnipotence of the 'King in Parliament'. 'The Sovereignty of Parliament', says Mr. Dicey, 'is from a legal point of view the dominant characteristic of our political institutions.' To the general principle reference has already been made; but it is important further to observe that it is resolved by Mr. Dicey into three propositions:

(1) There is no law which Parliament (i. e. the King in Parliament) cannot make;

(2) There is no law which Parliament cannot repeal or modify; and

(3) There is under the English Constitution no marked or clear distinction between laws which are not fundamental or constitutional and laws which are.

In a word the English Parliament is not merely a Legislative, but a Constituent assembly.

First: there is no law which Parliament cannot make. In 1701, for example, it made the Act of Settlement, an Act which, *inter alia*, actually determined the succession to the throne. In 1707 it effected, by ordinary legislative enactment, a legislative union with Scotland, and in 1800, by

similar action, a legislative union with Ireland. Those Acts fundamentally altered the Constitution of the two Houses of the Legislature, and indeed the whole Constitution of the United Kingdom. By the same authority and by similar process they could of course be repealed. But the crowning illustration of the omnipotence of Parliament is to be found in the Septennial Act of 1716. That Act not merely extended the duration of *future* Parliaments from three years to seven, but actually prolonged the existence of the sitting Parliament for that term. Constitutional purists, like Priestley, were aghast at this violation of the 'rights' of the people. And with much show of reason. For, by the same token, future Parliaments might prolong their own existence from seven years to seventy, or, like the Parliament of 1641, make it perpetual. Hallam derides Priestley's 'ignorant assumption'. But Priestley was right. If a Parliament elected under the Triennial Act could legally prolong its existence from three years to seven, there was nothing to prevent another Parliament, elected under a Septennial Act, from extending its term to seven hundred years.

But the really interesting and significant point is, that there is in fact nothing in the English Constitution to prevent such a usurpation on the part of Parliament. Nothing, that is to say, of a legal nature. Cromwell put a stop to a similar usurpation in April 1653, when he shut the doors upon the Long Parliament and ordered the removal of the 'bauble' of authority—the mace. But Cromwell did this, be it observed, not by an appeal to law, nor by an appeal to the constituencies—the ultimate depositaries of political sovereignty—but by an appeal to force. *Inter arma silent leges;* in the rattle of musketry you cannot hear the voice of the law. Cromwell's Ironsides were more than a match for the legal sophistries of the attenuated rump of the Long Parliament.

None the less, Mr. Dicey is fully justified in his appeal to

the Septennial Act as the sufficient and conclusive proof of the doctrine of Parliamentary Sovereignty. 'That Act', as he says, 'proves to demonstration that in a legal point of view Parliament is neither the agent of the electors nor in any sense a trustee for its constituents. It is legally the Sovereign power of the State, and the Septennial Act is at once the result and the standing proof of such Parliamentary Sovereignty.'[1]

Secondly: there is no law which Parliament cannot repeal or modify or temporarily set aside. At the time of the Disestablishment of the Irish Church in 1869 there was much discussion as to the competence of Parliament virtually to repeal one of the clauses of the Act of Union. Such an argument might have been perfectly valid as a political or even a moral ground of objection to Mr. Gladstone's proposal; but it had no legal validity whatsoever. Nor had the similar objection that the Ministry were, by the passing of this Act, virtually compelling the Queen to a violation of her coronation oath. From the point of view of the constitutional lawyer the Act of Union had no superior validity to the Act authorizing the construction of the Manchester and Liverpool railway. But Mr. Dicey lays especial stress in this connexion upon the enactments which, like Acts of Indemnity, are 'as it were the legalization of illegality'. For more than a hundred years (1727–1828) Parliament regularly passed an annual Act of Indemnity to relieve Dissenters from the penalties to which they exposed themselves for having, in violation of the Test Act, 'accepted municipal offices without duly qualifying themselves by taking the Sacrament according to the rites of the Church of England'. Such Acts are, as Mr. Dicey justly adds, 'the highest exertion and crowning proof of Sovereign power.'

But enough has been said to illustrate the legal omni-

[1] *Law of the Constitution*, p. 44.

potence of the English Parliament. Before quitting the subject, however, two further points deserve notice.

The first is, that in this respect—the enjoyment of this omnipotence—the English Parliament, and those assemblies which have been consciously modelled upon it, are practically unique among the legislatures of the world.[1]

The other is, that the English Parliament itself narrowly escaped restrictions. The moment when this danger threatened our Parliamentary omnipotence was one of the most interesting in the Constitutional history of England. In October 1647 the extreme Republican party drafted a Constitution known as *The Agreement of the People*. The eighth clause of this famous document was intended to define the position of the Legislature. It runs as follows:—

'That the Representatives have, and shall be understood to have, the supreme trust in order to the preservation and government of the whole; and that their power extend, without the consent or concurrence of any other person or persons, to the erecting and abolishing of Courts of Justice and public offices, and to the enacting, altering, repealing and declaring of laws, and the highest and final judgement, concerning all natural or civil things but not concerning things spiritual or evangelical. Provided that, even in things natural and civil, these six particulars next following are, and shall be, understood to be excepted and reserved from our Representatives, viz. . . . .'

There then follow five points of detail which do not, for the moment, concern us. The sixth is, in the present connexion, of first-rate importance; it declares 'that no Representative may in anywise render up or give or take away any of the foundations of common right, liberty, or safety contained in this agreement'.

What is the significance of this clause? It proposed that the powers of the Legislature should be limited; that certain questions of supreme importance or difficulty should be

[1] See *supra*, pp. 18 et sq.

reserved from its jurisdiction; that, in a word, its function should be legislative but not constituent. Not even the extreme democrats of the Commonwealth were willing to commit unlimited power to a single legislative Chamber. It may be objected that *The Agreement of the People* was never accepted and never came into force. That is true. But many of its principles reappear in the two written Constitutions of the Commonwealth and Protectorate.

Under the *Instrument of Government*, which was drawn up December 16, 1653, the legislative power was vested in 'the Protector, and the people assembled in Parliament' (§ 1). The twenty-fourth clause specifically provides: 'That all Bills agreed unto by the Parliament shall be presented to the Lord Protector for his consent; and in case he shall not give his consent thereto within twenty days after they shall be presented to him, or give satisfaction to the Parliament within the time limited, that then, upon declaration of the Parliament that the Lord Protector hath not consented nor given satisfaction, such Bills shall pass into and become law although he shall not give his consent thereunto; provided such Bills contain nothing in them contrary to the matters contained in these presents.'

What is the precise meaning of this clause and, in particular, of its concluding words? On this point there is some conflict of opinion between the Constitutional historian and the Constitutional lawyer. Dr. Gardiner contends that the intention was to devise a rigid Constitution, and to limit the authority of Protector and Parliament by the terms of the Constitution as defined by the *Instrument*. The Protector was, according to this view, invested with a short suspensive veto on ordinary legislation, but neither he nor Parliament, nor both combined, could alter or amend the Constitution itself. It is noticeable that this is not the interpretation placed upon the clause by a contemporary—Colonel Ludlow. His summary of the clause runs as

follows: 'That whatsoever they (Parliament) would have enacted should be presented to the Protector for his consent; and that if he did not confirm it within twenty days after it was first tendered to him it should have the force and obligation of a Law; provided that it extended not to lessen the number or pay of the army, to punish any man on account of his conscience, or to make any alteration in the Instrument of Government; in all which a negative was reserved to the single Person' (i. e. the Protector).[1] Ludlow obviously regarded the Protector and Parliament as being conjointly competent to alter even the terms of the Constitution itself, and that is the opinion of Mr. Dicey, than whom there is no higher authority on the legal aspect of the question.[2] It would seem, moreover, to be confirmed by the draft of *The Constitutional Bill of the first Parliament of the Protectorate*, clause 2 of which runs as follows: 'That if any Bill be tendered at any time henceforth to alter the foundation and government of this Commonwealth from a single Person and a Parliament as aforesaid that to such Bills the single Person is hereby declared shall have a negative.' Clearly, if the single Person did not veto the Constitutional amendment, it was to become law. This 'Constitutional Bill' never passed into law, and can be cited, therefore, only in illustration. But so far as it goes it would seem to support the contention of the lawyers that in a legal sense the *Instrument of Government* was not a 'rigid' but a 'flexible' Constitution. On the other hand, the *Instrument* does not provide any machinery for Constitutional amendment, and we know from external sources that Cromwell's own intention was that the Parliament should exercise merely legislative, and not constituent functions;[3] and further, that in con-

[1] Ludlow, *Memoirs*, p. 478.

[2] I must here tender my thanks to Mr. Dicey for permission to record this opinion and for his kindness in discussing the matter with me.

[3] See speech cited *supra*, p. 17.

sequence of its determination to debate 'constitutional' questions it was summarily dissolved by the Protector. The point is one of immense Constitutional significance, but here I am concerned with it only so far as to point out that certain 'fundamentals' were clearly and by general admission reserved from the jurisdiction of Parliament. Whether these 'fundamentals' could be amended by Parliament and Protector acting in conjunction is a moot point on which historians and legists are at issue.

It is interesting to observe that in regard to the limitation of the competence of the Legislature the two great branches of the Anglo-Saxon race have followed divergent paths. The obstinacy of the Protectorate Parliaments had its reward. Since the Restoration no attempt has been made in England to question the legislative omnipotence of Parliament. The English Parliament is indisputably constituent as well as legislative. The American Constitution, on the other hand, follows the example of the Protectorate and makes the Legislature subordinate to the Constitution.

There is another feature of the English Legislature which, though common to most modern States, is of first-rate importance alike from the historical and from the political point of view, viz. its bicameral structure. The ultimate adoption of this form was due partly to a series of fortunate accidents. The English Parliament, consisting originally, like the States-General of France, of three *Estates*, might naturally have organized itself in three chambers. Why did it, after about half a century, settle down into two chambers and two chambers only?

The model Parliament summoned by Edward I in 1295 consisted of five distinct elements: (1) the lay Barons; (2) the Bishops and Abbots, or Spiritual Peers; (3) the Knights of the Shire; (4) representatives of the Ecclesiastical Chapters and the parochial clergy; and (5) representative burgesses from the towns. We might have had

one single chamber containing all five classes; or five chambers, each containing one. Perhaps the most obvious and natural arrangement would have been three chambers; the first containing the lay barons and the knights; a second the clergy of all degrees; and a third the burgesses or *tiers état*. This obvious disposition was prevented by the separatist prejudices of the clergy, who preferred, instead of taking their place in the national assembly, to vote their contributions to the King in their own exclusively clerical assemblies of Convocation. Early in the fourteenth century the representatives of the inferior clergy had definitely dropped out of the national system, and they continued until 1663 to vote their supplies in Convocation. Four elements still remained. Of these the Knights, though elected like the Burgesses in the Shire-courts, were drawn naturally into political association with the Barons, to whom socially they were akin. For some years after 1295 the Knights sat with the Barons. But before the middle of the fourteenth century, precisely when, or precisely why, we do not know, the Knights had detached themselves from the Barons and had united with the Burgesses in a House of Commons. Thus within fifty years of its inception Parliament had assumed the shape which, except for a brief interval, it has ever since retained. Lay Barons and Spiritual Peers combined to form a House of Lords; the union of Knights and Burgesses constituted a House of Commons.

The evolution of the bicameral form was in itself of striking significance; but not less significant was the disposition of the several elements of which the two Houses were composed. Had the Knights of the Shire continued to adhere, as they well might have done, to the Barons, the history of the English Parliament might not improbably have resembled that of the French States-General or the Spanish Cortes. These representative Parliaments were practically coeval with that of England; but by the

beginning of the seventeenth century the one had finally disappeared, and the other had ceased to exercise any effective restraint upon the Crown. The failure of representative institutions in France and Spain cannot be ascribed to any single cause; but among the causes which contributed to their decadence not the least potent is the fact that their political organization corresponded to social distinctions. A King of France or a King of Castile could ally himself with the *tiers état* or burgesses for the destruction of the nobility, and then having destroyed the political power of the nobility could turn upon and rend the burgesses. In this way a wedge was driven into Parliament. In England this operation was rendered impossible by the solidarity of the two Houses; and that solidarity was due to the connecting link of the Knights of the Shire. The Knights were not infrequently actual members of noble families, and almost invariably they belonged socially to the same class as that which furnished members of the House of Lords. But socially united with the Peers they were politically allied to the Burgesses. This political amalgamation of Knights and Burgesses was rendered possible by the unique character of the English Peerage. In England the Peerage never degenerated into a caste; only the eldest son of a Peer became a Peer, and even he during his father's lifetime was a Commoner. Elsewhere, the dignities and privileges of Peerage attached not to the individual but to the family. In England, the House of Commons has always contained a considerable proportion, at any rate down to 1832, of persons who in other countries would be not commoners but nobles; and nothing has done more than this single fact to link the two Houses together and to maintain the solidarity and stability of Parliamentary institutions against any possible encroachment on the part of the Crown.

Having noted these two outstanding features of our

Parliamentary institutions—the legal omnipotence of the King in Parliament, and the bicameral arrangement of Parliament itself—we may now proceed to sketch the history of the Central Legislature.

The English Parliament, and more specifically the Upper House, is lineally descended from the Great Council of the Norman Kings, which in its turn may claim descent from the Anglo-Saxon Witenagemot. The precise composition of the Witenagemot has long been a matter of controversy among historical experts. Whether it was in theory an aristocratic or democratic body is a question which need not detain us; in practice it was unquestionably a small and aristocratic—or, more accurately, official—body. It consisted, on ordinary occasions, of the members of the Royal Family, officers of the King's Household, the Bishops, Abbots, Ealdormen or Earls, and Ministri or King's thegns. The work of the Witenagemot was at once administrative, legislative, and judicial: laws were promulgated with its counsel and consent; taxation, when required, was raised by its authority; it shared in the decisions of high questions of State, such as the declaration of war and the conclusion of peace; it witnessed grants of land, and acted as the Supreme Court of Justice. After the Norman Conquest the Witenagemot virtually reappeared under the title of the *Commune Concilium*. 'Thrice a year', says the Saxon Chronicle, 'King William wore his crown every year he was in England; at Easter he wore it at Winchester, at Pentecost at Westminster, and at Christmas at Gloucester; and at these times all the men of England were with him—Archbishops, Bishops, and Abbots, Earls, Thegns, and Knights.' Technicalities apart, this was obviously a meeting of the magnates of the realm. Did these several classes attend the Council in view of any more specific qualification common to all? It is not easy to answer this question with assurance; but whatever may

have been the original theory it is clear that the idea soon emerged that there rested an obligation upon all the military tenants of the Crown to attend the King's Council or Court. 'The Earldoms', as Bishop Stubbs put it, 'have become fiefs instead of magistracies, and even the Bishops had to accept the status of Barons,' i. e. military tenants-in-chief.

As the eleventh century advances the functions of the Council become more clearly defined; the administrative and judicial work is for the most part assigned to Committees which later on become known as the *Curia Regis* and the *Concilium Ordinarium*. The composition of the *Commune Concilium* becomes at the same time more determinate; in particular, a distinction is recognized between the greater and lesser Tenants of the Crown. Bishop Stubbs goes so far as to hazard a conjecture, 'that the landowners in *Domesday* who paid their relief to the Sheriff, those who held six manors or less, and those who paid their relief to the King, stood to each other in the relation of lesser and greater Tenants-in-Chief.' Be this as it may (and Bishop Stubbs's conjectures are always cautious) it is certain that a distinction between the greater and lesser Tenants-in-Chief had made itself manifest, at any rate by the time of Henry II, and that the distinction is marked in three ways: first, in the manner of summons to the Council; secondly, in the fiscal relations between the Crown and its Tenants, and, thirdly, in regard to military service. The greater Tenants—*Barones majores*—receive a personal summons to attend the King's Council, pay their feudal dues directly into the King's exchequer, and bring up their retainers to the King's assembly under their own banners. The lesser Tenants—*Barones minores*—are summoned to attend through the Sheriff of the Shire, pay their dues to the Crown through the same great functionary, and under him serve in the Host. The distinction, already well established by custom, receives legal sanction from the famous clause of

Magna Carta (§ 14): 'For the purpose of having the common Council of the Kingdom we will cause to be summoned the Archbishops, Bishops, Abbots, Earls, and Greater Barons (*Majores Barones*) singly (*sigillatim*) by our letters; and besides we will cause to be summoned generally by our Sheriffs or Bailiffs all those who hold of us in chief.' Another clause of the Charter provides that 'the heir of a Baron shall pay 100 marks for succession duty (relief), the heir of a Knight shall pay only 100 shillings.' It has been surmised, and with much show of probability, that the distinction in 'relief' corresponds with the distinction in the manner of summons. Be this as it may, it is clear that as the thirteenth century proceeds there is a widening differentiation between *Barones majores* and *Barones minores*; or, as we shall come to call the latter, Knights. Further, there is a progressive circumscription in the numbers of the Baronial class. Thus to the Welsh War of 1276 no fewer than 165 Barons received a special summons; to the Model Parliament of 1295 only 41.

Meanwhile, the *Barones minores*, or Knights, began to appear in the *Commune Concilium* in a new and very important capacity. There were summoned in 1213 to Oxford four discreet Knights from each county to consult with the King about State affairs. They are present in a *representative* capacity, and further consideration of the significance of this new departure must be deferred, therefore, until we come to deal with the evolution of the representative House. In this place it is enough to note that to the Parliament of 1295 there were summoned representatives of various classes besides the magnates, personally summoned, who constitute the basis of the future House of Lords.

The history of that House falls naturally into four periods: the first extending from the definite formation of the two Houses down to the Reformation; the second from the Reformation to the Restoration of 1660; the third from

the Restoration to the Reform Act of 1832; and the fourth from the first Reform Act to the present day.

Each of these periods presents some features which it is desirable briefly to notice.

During the first two centuries of its organized existence the House of Lords was very different in aspect and composition from the House with which we are familiar It was a small body; it was always largely, and sometimes predominantly, a clerical body; and it was to this extent a non-hereditary body. Firstly: as to its size. In 1295 those whom we should now call the Peers numbered 138: viz.:—7 Earls, 41 Barons, 20 Bishops, 3 Heads of Monastic Orders, and the 67 Abbots. By the first year of Edward II the numbers had increased to 156, but the total was differently made up. The lay Peers were now 80 in number, the Spirituals had already dropped to 76. In the first year of Edward III the total numbers of the House had dropped to 131; but while the lay Peers had increased to 86, the Spiritual Peers had further dropped to 45. At or about this figure the Spiritual Peers remained constant until the dissolution of the great Abbeys by Henry VIII. The Abbots, like the lower clergy, were impatient of the obligation to attend Parliament, and pleaded that they were not called upon to do so unless they held by military tenure; unless, that is to say, they were technically Barons. But while the Spiritual Peers thus decreased in numbers, the temporal Baronage tended also to decrease, and in greater proportion. In the first year of Edward III the temporal Baronage, as we have seen, numbered 86. In the first year of Richard II the numbers had fallen to 60; by the accession of Henry IV they had further fallen to 50; in 1413, to 38; and by 1422 to 23. The number increased somewhat in the middle of the century, but to his first Parliament Henry VII summoned only 29. I do not stay to inquire what were the causes of this remarkable

diminution ; partly, perhaps, the French War, partly the Wars of the Roses, and partly the failure of male heirs.

From this rapid summary two points emerge : (1) the numbers of the House of Lords were, compared with our modern standard, very small ; and (2) they varied, not inconsiderably, from reign to reign.

This last point raises an interesting question : Who were entitled to attend the House of Lords ? But the form of the question itself betrays the modern inquirer. The fourteenth-century magnate would rather have asked : Who is obliged to attend the King in Parliament ? For attendance was originally an obligation rather than a privilege ; a duty or service owed to the King. But the question remains : Upon whom did the irksome obligation rest ? The question is most effectively answered by observing the change in the connotation of the term *Baron*. A *Baron* is originally merely a feudal tenant holding land direct from the Crown under the obligation of military service. Gradually the term becomes restricted to the greater landowners who receive an individual summons to attend the King in Council. Thus, to use technical language, *barony by tenure* is superseded by *barony by writ*. The House of Lords, when definitively organized in the fourteenth century, is seen to consist of about 150 persons—sometimes more, sometimes less—who are entitled to receive special writs—an individual summons from the King.

But who were entitled to receive these writs ? The right of the Bishops was never disputed, though it is not certain whether the right was derived from their position as ecclesiastical magnates, or as holders of tenurial baronies. The right of the great Abbots was equally indisputable : but they successfully evaded their Parliamentary obligation except when it could be shown to rest upon their character as military tenants of the Crown. As to lay 'barons', the obligation or privilege seems originally to have depended entirely upon the caprice of the Crown. 'Barons' were

bound to attend, but only he was a 'baron' who received a special writ. But was the obligation perpetual? Once summoned, was a man always summoned? And was it hereditary? Did the right to a writ descend from father to son? These questions are not easily answered; but perhaps we may say with sufficient accuracy that, whatever the original theory, the custom quickly crystallized into an hereditary right. By the time that the obligation had developed into a right it had become clearly and legally established that the King could not withhold a writ of summons to the House of Lords from the heir of a person who had been once summoned and had obeyed the summons by taking his seat.[1]

But long before this point was definitely established a new method had been devised for creating Peers. The latter term, as denoting membership of the House of Lords, gradually came into use in the fourteenth century, the first use of it in this connexion being found in the Act against the Despensers, the favourites of Edward II (1322). The next reign witnessed the introduction of grades into the Peerage—a strange contradiction in terms. The title (originally the *office*) of Earl had come down from Saxon days; but of Earls there were (*temp.* Edward III) barely a dozen. In 1377 Edward III issued *Letters Patent* creating his son, the Black Prince, Duke of Cornwall; the first Marquis was created, in similar fashion, by Richard II in 1386, and the first Viscount by Henry VI. Richard II was the first King to create Barons by *Letters Patent*, but by Henry VI it had become the established method for the creation of all peerages.

Besides Bishops and Abbots, and the various grades of the lay Peerage, there was another class of counsellors of the Crown who from time immemorial have received a summons to attend the King in Parliament, but have never permanently established their right to seats. I refer to the Judges and the great law officers of the Crown, the Attorney and Solicitor,

[1] Cf. Case of the Clifton Barony, 1673; Freshville Case, 1677.

and the King's Ancient Serjeant. Such a summons still issues to the Law Officers and the Judges of the High Court of Justice; they are still enjoined to 'be at the said day and place personally present with us and with the rest of our Council to treat and give [your] advice upon the affairs aforesaid'. In obedience to this command the Judges are present in the House of Lords at the opening of each Parliament, and may at any time be called upon 'to give their opinions on difficult points of law which come before the House of Lords as a Court of Appeal'. But they are summoned in a special and inferior capacity. 'They are not summoned "on their faith and allegiance" nor to be present "*with* the said Prelates, Peers and great men" but "with us and the rest of our Council to treat and give your advice".'[1] This last phrase supplies the key to the enigma presented by the position of the Judges in, but not of, Parliament. They come, and come naturally and inevitably, as members of the Great Council, and their presence is due to the antiquarian confusion between the House of Lords, and the *Magnum Concilium* which practically lost itself in the House and which handed on to that House its judicial and conciliar functions.

To the functions of the House of Lords we may now pass. They are four: taxative, legislative, deliberative, and judicial. As an *Estate* of the realm the Lords originally possessed, like the Commons and Clergy, the right of voting their separate aids to the Crown; but before Parliament was a century old the Commons had already begun to acquire a pre-eminence in matters of taxation, and a consideration of this function may, therefore, be appropriately deferred. In legislation, on the contrary, the part of the Commons was originally inferior to that of the Lords, while both Houses were, until the fifteenth century, entirely subordinate to the Crown.

The 'Counsel and Consent' of the great men of the realm

[1] Anson, i. 52

had from time immemorial been a customary if not a necessary ingredient in the process of legislation. But the primary function of the representative assemblies which came into being, not in England only, in the thirteenth century was not legislation but supply. Not indeed until 1322 was the assent of the Commons deemed essential to legislation. Even after that time the Crown continued to enact statutes on the Petition of Parliament. Many were the complaints that the Statutes, as finally enacted, differed materially from the Petitions on which they were avowedly based, and not until, under Henry VI, the modern process of legislation by Bill was substituted for that of legislation by Petition was any effectual remedy discovered.

The deliberative function of the Lords is one which they have at all times shared with the Lower House, and it need not, in this connexion, detain us. It is otherwise with the judicial function. Both historically and practically this is the most distinctive, as it is one of the most important functions of the House of Lords, and it demands somewhat more precise examination.

In the absence of an adequate historical explanation, it would seem to be in the last degree anomalous that the highest judicial functions should attach to one of the two branches of the Legislature. The anomaly is only to be explained, as was hinted above, by the antiquarian confusion between the magnates of the *Magnum Concilium* and the Lords of Parliament. Virtually identical in *personnel*, the functions of the two bodies became inextricably confused. This confusion ceased under Richard II, but it had lasted long enough to impose indelibly upon the House of Lords a function which appears, on the face of it, curiously alien to a Legislative Chamber. In this particular function of the Lords the Commons claimed no part; on the contrary, they repudiated it with some emphasis. Thus, in reference to the proceedings against Richard II, the Commons, on

November 3, 1399, protested that 'they were not Judges of Parliament, but petitioners', and begged that 'no record may be made in Parliament against the Commons, that they are or will be parties to any judgements given or to be given hereafter in Parliament.'

The judicial functions of the Lords were, and are, in part appellate and in part original. As the Supreme Court of Appeal, and representing in that capacity the King in Council no less than the King in Parliament, the House of Lords has from the first corrected the errors of the Common Law Courts, and since the seventeenth century has extended its jurisdiction to appeals from the Court of Chancery.[1] As a Court of first instance it exercises jurisdiction over Peers charged with treason and felony, and on the accusation of the House of Commons it tried great offenders against the State by process of impeachment. Devised originally as a means of bringing to account powerful and highly placed offenders, the process developed into an assertion of the responsibility of the King's servants to Parliament. Its clumsiness and inadequacy were, as we have seen, perceived by the acute Constitutionalists of the seventeenth century. The development of the Cabinet system in the eighteenth century substituted a collective for individual responsibility, and the practice of impeachment fell into desuetude; but the process remained and remains a weapon in reserve.

The right of determining disputed claims to Peerages is sometimes included among the judicial functions of the Lords. But it would seem rather to be a privilege analogous to the right of the Commons to determine questions affecting the composition of their own House, and may be considered more conveniently under the head of Privilege.

The Lords share with the Commons the privilege of freedom of speech, freedom from arrest, freedom from jury service, and the right to commit persons to custody for contempt.

[1] See *infra*, c. xiv.

Every peer has also the right of individual access to the Crown, and of recording on the Journals of the House his formal protest against the decision of the majority, together with the grounds on which it is based.[1] Collectively the House has the right of excluding unqualified persons, and in the exercise of this right declined to admit Lord Wensleydale to a seat in the House on his creation as a life-peer in 1856. Conversely, it has the right of insisting that no duly qualified person shall be excluded—a right exercised when, in 1626, the House successfully petitioned King Charles I for the issue of a writ of summons improperly withheld from the Earl of Bristol. Until 1868 the Peers also enjoyed the right of delivering their votes by proxy, but in that year the custom was abandoned, and the right has, we may presume, consequently lapsed.

These powers and privileges were, of course, established only by slow degrees, but it has seemed better to enumerate them at this point before proceeding to sketch the salient features in the history of the House of Lords during the last three centuries, and attempting an estimate of its place in the Constitution of to-day.

[1] Cf. Thorold Rogers, *Protests of the Lords.*

CHAPTER VII

THE LEGISLATURE: (2) MODERN HISTORY OF THE HOUSE OF LORDS

'With a perfect Lower House it is certain that an Upper House would be scarcely of any value. If we had an ideal House of Commons perfectly representing the nation, always moderate, never passionate, abounding in men of leisure, never omitting the slow and steady forms necessary for good consideration, it is certain that we should not need a higher chamber. The work would be done so well that we should not want any one to look over or revise it. And whatever is unnecessary in government, is pernicious. . . . But though beside an ideal House of Commons the Lords would be unnecessary, and therefore pernicious, beside the actual House a revising and leisured legislature is extremely useful, if not quite necessary.'—BAGEHOT.

'It must be admitted that cases may occur, in which, the House of Lords continuing to place itself in opposition to the general wishes of the nation, and to the declared sense of the House of Commons, the greatest danger might arise, if no means existed of putting an end to the collision which such circumstances would produce, and which, while it continued, must unavoidably occasion the greatest evils, and in its final issue might involve consequences fatal on the one hand to public liberty, and to the power and security of the Government on the other. It is with a view to a danger of this nature, that the Constitution has given to the Crown the power of dissolving, or of making an addition to the House of Lords, by the exercise of the high prerogative of creating peers, which has been vested in the King for this as well as for other important purposes.'—*Minute of Cabinet*, Jan. 13, 1832.

THE modern history of the House of Lords dates from the sixteenth century, and more specifically from the Reformation. Only since then has it assumed those features which are now regarded as especially characteristic: its large and rapidly increasing numbers; its almost exclusively hereditary membership; the predominance of laymen. When Henry VIII ascended the throne the House con-

tained 48 ecclesiastics, who held their seats, at best, for life, and 36 laymen whose tenure had by that time become virtually hereditary. In the first Parliament of James I the hereditary members had increased to about 80,[1] while the Spiritual Peers were represented by 26 Bishops. At this figure the Bishops remained constant, except for the period 1642–61, when they disappeared altogether, and that between 1801 and 1869, when they were reinforced by the presence of four Irish Prelates. Already, therefore, the Bishops had become a small minority, and they have since become relatively smaller; but they have never been a negligible element in the House of Lords, and so uncompromising a Radical as the late Mr. Freeman was disposed 'to deal a little gently with so living and speaking a memorial of the days of our oldest freedom' and declared with emphasis that 'none should be listened to with more heed than the voices of those Lords whose seats are immemorial'.[2] Meanwhile the 'newer hereditary class which has sprung up around them' has increased in numbers out of all proportion or recognition. Barely 100 in the first Parliament of Charles I, they numbered 140 after the Restoration, and nearly 200 a century later, in the first year of George III. Of these, 16 represented, in the Parliament of the United Kingdom, the peerage of Scotland under the Act of Union (1707). The reign of George III added no fewer than 116 to the hereditary peerage of the United Kingdom, besides 28 Irish lay peers to the Lords of Parliament—bringing up the total of the lay peers in the House of Lords to 342. The short reigns of George IV and William IV added 60 more, while during the long reign of Queen Victoria some 300 peerages were created. A certain

[1] Exact estimates of the numbers of the lay peerage at a given date are curiously difficult to obtain; those I have seen vary from 70 to 81.

[2] *Essays*, 4th series, pp. 501, 2.

number of peerages have become extinct, but even so the number of hereditary peers in the House of Lords has now reached the unwieldy total of 552. It is common ground among all sections of reformers that one of the first steps must be a rigorous curtailment of these excessive numbers.

Of the House of Lords, as distinct from the House of Commons, there is little to record under the first two Stuarts. The two Houses united in opposition to the Crown throughout the whole period prior to the outbreak of war. It is true that when King Charles I left London in the spring of 1642 and set up a Court at York, he was followed to the North by a large number of peers; and as the war went on the House of Lords at Westminster presented a more and more deserted appearance. None the less the famous Resolution of March 19, 1649, by which the 'Commons of England' abolished the House of Lords as 'useless and dangerous to the people of England', indicates a fatal inclination towards political theory and a desertion of the safer and straiter road of constitutional experience. The experiment of a single-chambered Legislative Assembly, tried under the Commonwealth and the Protectorate, was not successful, and no one recognized the failure more frankly than Cromwell himself. An attempt was made to repair the error in the *Humble Petition and Advice* (1657), but not even the creation of 'another' House could reconcile parliamentary government with the rule of the sword, and not until the restoration of the hereditary monarchy was vigour restored either to the hereditary or the elected Chamber.

With the Restoration we enter upon a new period in the history of the House of Lords. The House of Commons, unduly elated by their recent though transient victory over the hereditary principle as embodied in the Crown and the Upper House, manifested unusual sensitiveness as to their own privileges and unprecedented jealousy

as to those of the Lords. On two points in particular the Houses came into serious conflict during the half century following the Restoration: upon finance, and upon the exercise of the judicial functions of the House of Lords. As to the former, discussion may be deferred until we come to deal with the powers of the House of Commons; as to the latter, it is appropriate to say a word here.

The House of Lords, as we have seen, had definitely established its jurisdiction as a court for the correction of errors in law committed by the lower courts, in the fourteenth century. For some reason which even the lawyers cannot explain, this jurisdiction was little used throughout the Lancastrian, Yorkist, and Tudor periods. With much else, it revived in the later years of Elizabeth and was exercised without dispute. In the early part of the seventeenth century the Lords put forward two further claims. They claimed and exercised the right to entertain appeals not only from the Common Law Courts but also from the Court of Chancery; and, further, to act as a court of first instance both in civil and criminal cases. After the Restoration, however, both these claims were hotly contested by the Commons, and were brought to the test in the famous cases of *Skinner* v. *The East India Company* and *Shirley* v. *Fagg*. The former raised the question as to the competence of the House of Lords to act as a court of first instance; the second as to its right to entertain appeals from the Court of Chancery. In neither case are the details pertinent to our present purpose; in both the result was of first-rate importance. Thomas Skinner petitioned the Crown for redress for his 'sufferings under the barbarous oppressions of the East India Company'. The Crown referred the matter to the House of Lords, who, by acting on the reference, proceeded to exercise an original jurisdiction in a civil case. The company thereupon petitioned the Commons, who raised the preposterous plea of privilege

on the ground that certain members of the company were also members of the Commons' House, and simultaneously denied the right of the Lords to act as a court of first instance in civil cases. A violent quarrel between the two Houses ensued, and lasted for nearly four years. It was ended only by the intervention of the King; records were erased, but victory rested with the Commons. The Lords have never again claimed to exercise original jurisdiction in a civil suit. It was otherwise in the case of *Shirley* v. *Fagg* (1675). Shirley appealed to the House of Lords against the decision of the Court of Chancery in favour of Sir John Fagg. The Lords entertained the appeal; the Commons interposed and denied the Lords' jurisdiction, but eventually gave way, and the right of the Lords was thus tacitly acknowledged. The Commons were evidently in a quarrelsome temper, and the disputes as to *Tacking* prove that this temper had not entirely subsided by the beginning of the eighteenth century. But apart from this there was, during the ensuing period, little friction between the two Houses.

Nor is the reason far to seek. The period between the Revolution of 1688 and the Reform Act of 1832 marks the zenith of the power, if not of the House of Lords, at least of the Lords. For a brief period the aristocratic principle gained complete ascendancy in English politics, central and local alike. For this there were several reasons. The Revolution of 1688, complemented by the Hanoverian accession in 1714, marked the close of the acute struggle between parliamentary and monarchical principles. Parliament won; but though triumphant as against the Crown, it was as yet very imperfectly responsible to the nation at large. In the Revolution of 1688 the people had little share. It was primarily the work of a small knot of aristocratic leaders who were politically far in advance of the general political sense of the mass of the people[1] It was

[1] See Lecky, *History of England*, vol. i. c. 1

they who supplanted James II and set up Dutch William; it was they, again, who in 1714 prevented a Stuart restoration and secured the throne for the Elector of Hanover. During the eighteenth century they reaped in abundant harvest the fruits of their double victory. Disraeli wrote of the 'Venetian oligarchy' with characteristic exaggeration, but with substantial accuracy. Between 1688 and 1832 the Government of England was essentially oligarchical. A group of noble families dominated both the central and the local government.

In local government the eighteenth century witnessed the apotheosis of the territorial magnate. Down to this time the power of the great landed proprietors had been held in check partly by the strength of the monarchy and partly by the existence of a large and vigorous class of yeomen. But the sixteenth and seventeenth centuries were disastrous in their effects upon the small landowner.[1] In the eighteenth century political causes gave an added momentum to the economic forces which had long been in operation, and which were now threatening the small landowner with extinction. The stout yeoman, once the peculiar glory of England, was fighting a losing battle all through the eighteenth century, and finally surrendered to the allied forces of the Industrial Revolution and the Napoleonic War. Legal, economic, social, and political forces were all leagued against him. By an Act of 1662 the militia colonelcies were confined to men possessed of £1,000 a year from landed property, the lieutenant-colonelcies to men with £600; under George III the qualification for county magistracies was raised from £60 to £100 a year, and for deputy-lieutenancies to £200 a year. Already, in 1711, it had been enacted that a knight of the shire must possess landed estate worth £600 a year, and a borough member estate worth £300. The introduction of scientific

[1] Cf. A. H. Johnson, *The Disappearance of the Small Landowner.*

methods into agriculture necessitated the employment of capital on a large scale, and this combined with the decay of the domestic industries to ruin the small farmer. If he was farming his own land he was compelled to sell it, and either went into the new town to try his luck in commerce or remained in the country as a tenant-at-will. The enclosure of seven millions of acres between 1760 and 1845 was at once cause and effect of the new economic and social movement. From the social point of view we cannot but deplore it; economically it contributed one of the most important elements to the industrial supremacy of the new England which emerged in the nineteenth century.

The economic and social changes found their counterpart in the political sphere. To an increasing degree owner of the land and supreme in local administration, the great lord became the controller of the parliamentary machine and thus of the central government. Sydney Smith, writing in 1821, declared that 'the country belongs to the Duke of Rutland, Lord Lonsdale, the Duke of Newcastle, and about twenty other holders of boroughs,—they are our masters'. The statement proceeded from a somewhat tainted source, but even if exaggerated it contained more than a semblance of truth. The Duke of Norfolk did in fact return eleven members, Lord Lonsdale returned nine, Lord Darlington seven, and the Duke of Rutland, the Marquis of Buckingham, and Lord Carrington six each. A petition presented in 1793 on behalf of the *Friends of the People* declared that 357 members were returned by 154 patrons, of whom 40 were peers. Oldfield declares that in 1816 no fewer than 487 out of the 658 members of the Lower House were nominees; that of the English members 218 were returned by the nomination or influence of 87 peers, 137 by 90 powerful commoners, and 16 by the Government. Of the 45 Scotch members 31 were returned by 21 peers, and of the hundred Irish members 51 were returned by

36 peers. Masters in their own House, the Peers were able, therefore, to control in large measure the proceedings of the Lower House as well.

The only real rival of the Peerage in the eighteenth century was the Crown. How seriously the Crown might encroach upon their omnipotence the Peers were rudely reminded when, in 1711, Queen Anne created a batch of twelve new peers to facilitate the policy of her Tory Ministry. Warned by this incident of the one serious danger to which their citadel was exposed, the Whig oligarchs produced the Peerage Bill of 1719. Lord Sunderland, who was primarily responsible for this famous Bill, was a typical 'revolution Whig', equally mistrustful of the Crown and of the people. He proposed to restrict within the narrowest limits, and indeed practically to abolish, the royal prerogative of creating new peers. The Peerage was never to exceed its existing number by more than six. The Crown might hereafter create six new peerages, and for every peerage which became extinct might create one new one, while the Scotch Peerage was to be represented in perpetuity by twenty-five hereditary in place of the sixteen elected peers. The general effect of the Bill would have been to fix the limits of the lay Peerage at about two hundred. This in itself might not have been undesirable. It was clearly detrimental to the independence of the Upper House that successive factions should, on slight pretexts, have the power of swamping it. But whatever the arguments in favour of Sunderland's Bill, there was one overwhelming reason against it. Once it had been placed upon the Statute Book, the safety-valve of the Constitution was shut. Had the two Chambers been really, as they were theoretically, co-ordinate in legislative authority, recurrent deadlocks could hardly have been avoided. A reserve power by which they can be brought into agreement must subsist somewhere; an appeal must lie either to the

electorate or to the Crown or to both. But though the Peers may in their discretion bow before the clearly expressed will of the nation, they cannot be legally or formally compelled to do so. A coercive power is, therefore, vested in the Crown—the power of creating new peerages and thus compelling a recalcitrant House of Lords to accept the verdict of the political Sovereign. George I, only languidly interested in English domestic politics, was willing to see himself stripped of this, one of the highest and most valuable prerogatives of the Crown, but the strong and sure political instinct of Sir Robert Walpole detected the danger which lurked in Sunderland's proposal, and thanks to his strenuous and effective opposition the Bill was defeated.

The acceptance of Sunderland's Bill would have worked serious mischief to the balance of the Constitution. It is true that the royal prerogative has never again been exercised as it was, in 1711, by Queen Anne. But the reason is obvious. The fact of the existence of such a reserve power has been sufficient. The sword has never been drawn from the scabbard, but had the scabbard not been known to contain the sword, trouble would quite certainly have ensued. The readiness for war has preserved the peace. Rather than provoke a war which could end only in defeat the Peers have invariably given way as soon as it has become unmistakably clear that the elected Chamber had the support of the electorate, and that the Crown was prepared effectually to translate into action the will of both electors and elected. But there is another reason why it has never been necessary to unsheath the sword. The dramatic coup of 1711 has never been repeated; but the numbers of the lay Peerage have nearly trebled since 1719. The House of Lords has never been swamped by a single tidal wave; but its waters, naturally perhaps sluggish if not stagnant, have been ceaselessly refreshed by streams from the most unpolluted sources which the nation can provide.

Successful activity in every domain has conducted its possessor to the House of Lords. Soldiers and statesmen, distinguished exponents of art, men of letters and science, great lawyers and successful traders ;—all that is most vital and energetic in the national economy finds representation within the walls of the gilded chamber. Sunderland's Bill would have closed the door to all this, and would have perpetuated the narrow oligarchy of the Revolution, until it was swept away in a storm of national passion and disgust. The oligarchy has indeed disappeared, but its disappearance has not involved the ruin of the House in which Sunderland would have temporarily enthroned it.

By the middle of the eighteenth century it was already clear that its days were numbered. As Disraeli put it in a characteristic sentence : 'It could no longer be concealed that by virtue of a plausible phrase power had been transferred from the Crown to the Parliament, the members of which were appointed by an extremely limited and exclusive class who owned no responsibility to the country, who debated and voted in secret, and who were regularly paid by a small knot of great families, that by this machinery had secured the permanent possession of the King's Treasury. Whiggism was putrescent in the nostrils of the nation.' No one realized this fact more acutely than the Monarch. The elder Pitt taught George II to look beyond the House of Commons to the masses of his subjects, as yet politically unrepresented. George III took this lesson to heart, and not a little of the success which he achieved in his contest with the Whig oligarchy was due to his clear perception of its significance.

After the conclusion of the great peace in 1815, it soon became manifest to all men that new forces were beginning to operate in English politics. A new industrial England had come into existence during the last few decades; agricultural methods, no less than industrial, had been

revolutionized; population was growing at an unprecedented rate; wealth had been increasing even faster than population; foreign commerce had been expanding under the twofold stimulus of improved methods of production and unparalleled demand for English goods in foreign markets; and yet the mass of the people were restless and ill-conditioned and discontented. In the nidus of economic upheaval, of social agitation and political discontent, Chartism was born. And Chartism was sternly and exclusively political in its demands. In the forefront of its programme was the demand for parliamentary and electoral reform, and it was one which after 1815 it was increasingly difficult to ignore or resist.[1] The detailed history of the movement belongs to another chapter; we deal with it here only in its bearing upon the position of the House of Lords.

The first Reform Bill of 1831 was carried in the House of Commons on March 22 only by a majority of one in a House of 603. Defeated on General Gascoigne's motion for adjournment, Lord Grey and his colleagues tendered their resignation to the King, but the King refused to accept it and dissolved Parliament. Supported by a majority of 100 the Government passed their second Bill through the Commons, but on October 8 they suffered defeat in the Lords by 199 to 158. The prorogation of Parliament was followed by serious riots in the country. On December 12, Lord John Russell introduced his third Bill, which after a rapid and triumphant passage through the Commons was read a second time by the Lords on April 13. Defeated on an amendment moved by Lord Lyndhurst, the Grey Ministry again tendered their resignation; but neither Lyndhurst nor Manners Sutton[2] could form a Government, and the King was compelled to recall the Whigs, who refused to retain office except on

[1] See *infra*, c. x.

[2] At that time Speaker; the attempt cost him the Speakership in 1835.

the understanding that the King would create sufficient new peers to carry the Reform Bill without substantial amendment. Reluctantly the King gave his promise in the following historic document :—

'The King grants permission to Earl Grey and to his Chancellor, Lord Brougham, to create such a number of peers as will be sufficient to ensure the passing of the Reform Bill, first calling up peers' eldest sons.

William R. Windsor

May 17, 1832.'

Further resistance was useless; even the Duke of Wellington recognized that the game was up, and at the request of the King, and to save him from the disagreeable alternative of creating 'sixty or perhaps eighty' new peers, the Duke advised his followers to forgo further opposition; one hundred Tory peers withdrew from the House; the Reform Bill passed through the Lords and on July 7, 1832, received the Royal assent.

The House of Lords, and in particular the Duke of Wellington and Lord Lyndhurst, suffered much criticism and indeed incurred not a little odium for their prolonged resistance to parliamentary reform. Was it justified? The Duke was sincerely convinced that the Pre-Reform Constitution was as nearly perfect as a Constitution could be. He had given expression to this opinion, perhaps incautiously, at a recent date. Under that Constitution the members of the Upper House were undeniably the predominant partner. For a century and a half the arrangement had worked well. Under the rule of an aristocracy the kingdom of England and Wales had developed into Great Britain; had united Ireland to itself in the bonds of a legislative union; had humbled its great rival France on three continents, and, finally, had expanded into an Empire rapidly tending to become world-wide. No one can reproach the aristocracy of the eighteenth century with

political inanition or ineffectiveness. In 1831 it was invited to commit political suicide. It ought no doubt to have discerned the 'signs of the times'; to have perceived that great constitutional changes had been rendered inevitable by the economic revolution; to have appreciated the virtue of timely self-abnegation; and yet, human nature being what it is, can we deem it wonderful that the Peers should have clung with tenacity to the political pre-eminence which they had enjoyed with evident advantage, not only to themselves but to the nation at large, for more than a century? Varying temperament will doubtless dictate various answers to this question; but as to the actual effect of the Reform Act of 1832 upon the House of Lords there can be no ambiguity. The Lords were no longer masters of the political situation; supremacy passed from the great territorial magnates to the middle classes: to the manufacturer, the trader, and the farmer. The Lords had to adjust themselves to a new political environment. In this difficult task they were immensely assisted by the transcendent authority, the unquestioned patriotism, and the sound common sense of the Duke of Wellington. Bagehot declared that it was 'the sole claim of the Duke of Wellington to the name of a statesmen', that he presided over the difficult period of transition. Be this as it may, the fact is indisputable; the Duke gradually led the Lords into a frank acceptance of their new place in the Constitution—a place undeniably secondary to that of the elected Chamber. 'For many years, indeed from the year 1830 when I retired from office, I have endeavoured to manage the House of Lords upon the principle on which I conceive that the institution exists in the Constitution of the country—that of Conservatism. I have invariably objected to all violent and extreme measures . . . I have invariably supported Government in Parliament upon important occasions, and have always exercised my personal influence to prevent

the mischief of anything like a difference or division between the two Houses.' Thus wrote the Duke to Lord Derby in 1846. The claim he puts forward is undeniable. He indicated to the Lords their appropriate functions under the new conditions of English politics, and taught them to respect the limitations which those conditions imposed upon them.

In the main the Lords have shown themselves apt pupils. They have followed the Duke's precepts and conformed to the conditions he laid down.

What has been the place of the House of Lords in the Constitution since the Reform Act of 1832? One important section of their duties was entirely unaffected by the Act and may be summarily dealt with. As the final court of appeal the importance of the House of Lords has steadily increased with the growing complexity and variety of legal business. To enable the House to cope with it successfully some afforcement of the legal members proved to be necessary. During a great part of the eighteenth century the Lords were notoriously unequal to their legal duties. In the nineteenth matters improved owing to the more frequent changes of Government and the consequent increase in the number of ex-Chancellors. But there was still room for further improvement, and in 1856 Queen Victoria was advised to confer a life-peerage upon a distinguished judge, Sir James Parke—a Baron of the Court of Exchequer. This eminently sensible step caused a strange flutter in the breasts of the hereditary peers. The whole fabric of the Constitution seemed to be in danger of demolition. In the event, the Peers, while admitting the right of the Crown to create life-peerages, refused to admit such peers to a seat in the House of Lords. The immediate difficulty was overcome by conferring upon Sir James Parke an ordinary hereditary or 'descendible' peerage under the style of Baron Wensleydale. This famous case raised two questions: one

of law, the other of political expediency. As to the former. the balance of legal authority is in favour of the contention of the Lords. On the one side it was not denied that life-peerages had been created in the past; on the other, it was admitted that for four hundred years there had been no instance of 'a commoner being sent under a peerage for life to sit and vote in the House of Lords', while earlier precedents were at least of doubtful authenticity. Mr. Freeman derides the 'silly superstition about "ennobling of blood"', and blusters about the 'insolent opposition of the comparatively modern class who had step by step practically made themselves the House of Lords.'[1] Bishop Stubbs, on the other hand, definitely asserts that 'no baron was ever created for life only without a provision as to the remainder or right of succession after his death'.[2] But even if the Lords were correct in their interpretation of constitutional law, the political expediency of their decision was in the highest degree questionable. They shut the doors of their House upon a class who might well have added wisdom to their counsels and weight to their decisions. Moreover, the Peers went near to losing, owing to their decision in the Wensleydale case, their historic rights of appellate jurisdiction. A clause in the *Supreme Court of Judicature Act* of 1873 extinguished those rights, but by the Act of 1875 that clause was rescinded, and by the Act of 1876 the appellate jurisdiction of the House of Lords was for the first time placed upon a statutory basis. Provision was then made for the creation, immediately of two, ultimately of four life-peers, to be known as Lords of Appeal in Ordinary. Thenceforward no appeal was to be heard unless at least three Lords of Appeal were present, such Lords including not only the Lords of Appeal in Ordinary, but the Chancellor, ex-Chancellors, and any other peers who 'hold or have held high judicial office'.

[1] *Essays* 4th series, 475, 474.

[2] Stubbs, *C. H.* iii. 439.

The right of ordinary lay peers to take part in the judicial work of their House remains, of course, unaffected by the Act of 1876; the vote of a lay peer if tendered could not be refused; but, in fact, it never is tendered, and the judicial business of the House is left to a small body of lawyers, by whom it is by general consent admirably performed. It is possible that among persons imperfectly informed there may lurk some prejudice against the legal decisions of an 'hereditary chamber'; but we may confidently expect that fuller information will dissipate it, and that a singularly interesting historic survival may be preserved without the sacrifice of practical utilities. It should be added that since the enactment of an amending statute in 1887, the salaried Law Lords retain their seat, though not their salaries, after the resignation of office. An ex-Lord-of-Appeal-in-ordinary is, therefore, strictly a life Lord, if not a life Peer. The twenty-six bishops in the House of Lords are, on the other hand, official Lords of Parliament, retaining their seats in the House only so long as they retain their sees. While, therefore, the number of Law Lords might, by rapid resignations, be largely increased, the number of spiritual Lords could not. For in the Acts under which, since 1847, new bishoprics have been created, it has invariably been provided that apart from the two Archbishops and the Bishops of London, Durham, and Winchester, who have official seats in the House of Lords, only twenty-one other bishops—in order of seniority—should sit. Consequently there are now (1910) ten English and Welsh diocesan bishops without seats.

Apart from the somewhat anomalous function of a law court, what is the place of the Second Chamber in our modern Constitution? According to constitutional theory the Upper House has co-ordinate powers with the Lower in regard to legislation, equal powers of deliberation, and somewhat inferior powers in regard to taxation.[1] In relation

[1] This statement is no longer accurate. See pp. xviii–xx.

to the Executive it shares with the Commons the right of criticism, but not, according to some of the highest authorities, that of dismissal.[1]

As regards Legislation. Though the rights of the House of Lords are in constitutional theory co-ordinate with those of the Commons, they are in fact inferior. During the last twenty years the Lords have almost entirely ceased to exercise their undoubted right of initiation. But this right has been usurped, not so much by the Commons as by the Cabinet. With every session the chance of passing into law a Bill promoted by a private member, whether it be introduced into the Lower or the Upper House, sensibly diminishes. The initiative in legislation has, in truth, passed to the Executive; criticism, amendment, and revision are the sole functions left to the nominal Legislature, and these are performed not less freely and effectively by the Upper than by the Lower House. Every year, indeed, the Ministry tends to become more and more autocratic in regard to legislation and less and less disposed to accept amendments to Government Bills[2] either from friends or foes in the House of Commons. The House of Lords is less amenable to the crack of the Ministerial whip, and its responsibility in regard to the details of legislation tends, therefore, to increase. But its duties in this respect are performed under conditions which every year become less tolerable. Bills forced through the Lower House by the aid of the 'guillotine' are sent up to the House of Lords at a period of the session which renders serious criticism difficult, if not impossible. It is not easy to apportion justly the blame for a state of things which

[1] The power of 'dismissal' is, of course, only indirect. No Ministry can for any length of time retain office unless it enjoys the confidence of the House of Commons.

[2] This has been set forth in tabular form by Mr. Lowell, *Government of England*, vol. i, p. 317.

in itself is indefensible. But this much may be said: the need for an effective revising Chamber becomes not less but increasingly manifest. Whether the existing House of Lords is the fittest instrument for such work is, of course, a disputable point; but that the work needs to be done, and to be done with more and more care and deliberation, is a proposition which can be denied by no critic who is at once informed and impartial.

This, then, is the primary and indisputable function of the House—to revise and, if need be, to amend legislative projects. In regard to finance Bills, the Lords have not for more than two centuries claimed the formal right of amendment, but until 1861[1] they virtually exercised it. They still, however, reserve to themselves the right of rejection, though obviously it is a right which can be exercised only in a case which the Lords consider to be extreme.

Such a case can in practice arise only when a finance Bill embodies principles to which the electorate has not previously assented, and may be regarded, therefore, as a particular instance of the general right of the Lords to interpose a suspensive veto. An absolute veto is not claimed for them by the most fanatical adherent; but it is urged that there is need for some body, independent alike of the House of Commons and of the Ministry of the day, to ascertain that the will of the political sovereign is being justly interpreted by the legal sovereign. When there is room for legitimate doubt on this point, it is the right or rather the duty of the Lords to give to the electorate the opportunity of expressing an opinion on legislation which has received the assent of the Commons. Such a case arose when in 1893 the Lords rejected the second Home Rule Bill.

At this point two reflections obtrude themselves. It may be urged that a general election forced by the action of the

[1] See *infra*, p. 208.

Lords is at best a clumsy and uncertain method for ascertaining the will of the electorate on a particular issue. It is; but the Constitution at present knows no other. Rarely is it possible to isolate an issue at a general election. Perhaps that of 1886 came nearest to the nature of a plebiscite. On that occasion the electorate condemned quite unambiguously Mr. Gladstone's scheme of Home Rule. But such clear-cut issues are not common in English politics, and consequently it is, as a rule, none too easy to say whether a particular measure has or has not received a mandate from the electorate. But there is another objection to the referendal authority of the Lords. It is urged that it comes into play only when the Liberal party commands a majority in the Commons. Nor can any impartial person deny that there is force in the objection. But it is easier to acknowledge the difficulty than to suggest a remedy. A Second Chamber must from the nature of the case tend to be more conservative than the First. Were it not, much of its *raison d'être* would disappear. This being so, the referendal function must be more conspicuous when a Liberal Ministry is in office.

Nevertheless, any fair-minded student of politics will admit that the House of Lords has performed a difficult function with tact and good sense. At any rate, it has seldom erred seriously in gauging the general will of the electorate; and were the House of Lords abolished to-morrow it would be necessary to devise some constitutional means for restraining the vagaries of a single chamber which would then be virtually omnipotent. Even in countries possessing written *Instruments* or constitutional codes some such check is regarded as indispensable; it is certainly not less so in a Constitution which rests almost wholly upon conventions and 'understandings'.

Two other useful functions appertain to the House of Lords: it is a 'ventilating' chamber and it forms a 'reservoir

of Cabinet Ministers'. It supplies an admirable arena for the discussion of problems, social, administrative, or what not, which are not yet ripe for legislative solution. Many questions which lie or ought to lie outside the domain of party politics can be discussed more congenially in the relatively independent atmosphere of the Lords. There sit for the most part the veterans of the State: the long-beards of politics, great generals, pro-consuls, thinkers, artists, physicians, lawyers, traders. If in such an assembly we cannot find the wisdom that comes from ripe experience, in what quarter shall we seek it? But it is not only the refuge of the Emeriti, but the 'reservoir of Cabinet Ministers'. The administration of a great department of State is enough to tax the energies of all but the strongest, apart from regular attendance upon the prolonged sittings of the House of Commons. But for the House of Lords, Cabinet office would have to be confined, as a rule, to political babes. For the man whose strength is unequal to the double strain of party leadership in the Commons and departmental administration, the House of Lords offers an appropriate retreat.

Unless, therefore, we are to remodel our Constitution *ab ovo* a Second Chamber would seem to be a political necessity. But it by no means follows that such a Chamber should take the form of the existing House of Lords.

That House is indeed unique among the Second Chambers of the world. No nation of the first rank, or even the second, and not more than one or two of the third, have deemed it prudent to discard the bicameral structure of Parliament. The experiment of a unicameral Legislature has indeed been frequently tried; notably by France, England, and, for a very brief period by the United States; but no great nation has ever adhered to it. And yet *a priori* there is much to be said for the famous dilemma

propounded by the Abbé Siéyès: 'If a Second Chamber dissents from the first it is mischievous; if it agrees with it, it is superfluous.' But the nations of the modern world have with rare unanimity refused to be impaled upon the horns of this dilemma. Nevertheless, while adhering to the bicameral form, not one of them has provided itself with a Second Chamber like our own.

The English House of Lords is at once the largest, the most predominantly hereditary, and perhaps, among countries of the first rank, the least effective Second Chamber in the world. The German Imperial Council or Bundesrath contains only 58 members; the American Senate 90; the Austrian Herrenhaus 266; the French Senate and the Prussian Herrenhaus 300; the Italian Senate and the Hungarian Table of Magnates about 400. The House of Lords, therefore, is at least one-third larger than the largest of foreign Second Chambers. The German Bundesrath is nominated by the Sovereign Princes and Free Cities of the Empire. The Second Chambers of France, the United States, the Australian Commonwealth, the Swiss Republic and others are elective—though not always by *direct* election. Those of Canada, Italy, and Russia consist of nominees. Some, like those of the South African Union, Denmark and Russia, combine the nominee and elective principles; some, like those of Austria, Hungary, and Prussia, the hereditary and the nominee; some, like that of Spain, the hereditary and elective principle. None is so predominantly hereditary as our own. In political effectiveness the American and French Senates, to say nothing of the German Bundesrath, are clearly superior to the House of Lords.

Whether the House of Lords is likely to retain its present form and structure and powers is a question beyond the scope of this work.[1] This much, however, may be said.

[1] It has been discussed in detail by the present writer in *Second Chambers* (Clarendon Press, 1910).

The teachings alike of philosophy and of experience are opposed to the idea of a single Legislative Chamber. Even in written Constitutions where powers and functions are rigidly defined, it has been deemed universally desirable to divide power between two Houses. The argument in favour of the bicameral structure applies with even greater force to a Constitution which is alike unwritten and exceptionally elastic.

CHAPTER VIII

THE LEGISLATURE: (3) THE HOUSE OF COMMONS

'The right of attending Courts and assemblies was not a coveted right; we must think of it rather as a burdensome duty, a duty which men will evade if they possibly can.'—MAITLAND.

'The union of all classes of freemen, except the clergy and the actual members of the peerage, of all classes, from the peer's eldest son to the smallest freeholder or burgess, made the House of Commons a real representation of the whole nation, and not of any single order in the nation.'—FREEMAN.

'Igitur communitas regni consulatur
Et quid universitas sentiat sciatur.'
—*Political Poem, Thirteenth Century.*

'Quod omnes tangit, ab omnibus comprobetur.'—EDWARD I.

'There is no difficulty in showing that the ideally best form of government is that in which the sovereignty, or supreme controlling power, in the last resort is vested in the entire aggregate of the community; every citizen not only having a voice in the exercise of that ultimate sovereignty, but being at least occasionally called on to take an actual part in the government by the personal discharge of some public function, local or general.'—JOHN STUART MILL.

'The English Parliament strikes its roots so deep into the past that scarcely a single feature of its proceedings can be made intelligible without reference to history.'—SIR COURTENAY ILBERT.

WE have dealt in the two preceding chapters with one only of the two main branches of the bicameral Legislature. It is time to turn to the other, the 'Lower', Representative', or, more strictly speaking, elected Chamber. One point confronts us on the threshold of the inquiry: the representative principle is comparatively a modern expedient, devised to meet comparatively modern conditions. The democracies of the ancient world knew nothing of it. Its adop-

tion was due primarily to the fact that the rulers of the expanding kingdoms of the later Middle Ages found themselves unable to 'live of their own', to meet growing national expenditure out of their accustomed and hereditary revenues, and were consequently compelled to have recourse to 'extraordinary' methods of taxation. To the imposition of these taxes they were anxious, for obvious reasons, to obtain the assent of as many of the tax-payers as possible. There were three possible ways of doing this: to assemble the whole body of citizens in some central place; or to send accredited agents into the several localities and there obtain the required assent of individuals; or, thirdly, to invite the citizens to elect representatives to speak with plenary authority on their behalf. The first was the common device of the ancient world: the democracies of Greece were not representative but direct. The citizens performed their several political functions not by deputy but in person. The work of the legislator, the judge, the soldier, the priest, was the common duty incumbent upon all who enjoyed the rights of citizenship. To make laws and administer them, to decide disputes, to fight and to intercede with the gods were not the specialized functions of certain professions, but the tasks undertaken in turn by all citizens. But this 'direct' Democracy was rendered possible by two features of the ancient world, neither of which is reproduced in the modern: the States were strictly limited in size, and every citizen had unlimited leisure. A 'State' was coincident with a 'city' with only so much of circumjacent territory as to render it economically self-sufficing. Athens was about the size of Kent, and every Athenian citizen was a man of leisure: free to devote himself to 'political' life. But this meant that material necessaries and comforts must be supplied by the labour of slaves. Slave labour was the economic basis on which the Athenian Democracy rested, and at the zenith of Athenian greatness the

unfree population of Athens outnumbered the free by four to one.

Far different is the ideal of modern Democracy. The mass of the citizens are necessarily engaged in daily toil in order to procure their daily bread. Leisure is scant, but even were it ample, the huge size of modern States would forbid the adoption of the expedients dear to the philosophers of the ancient world. If the people at large are to participate in the making of laws, still more in their administration, it can be only by the adoption of the principle of representation. It is impossible to imagine the forty million citizens of England or France, or even seven or eight millions of electors directly participating in the actual work of legislation. Whether they might not by means of referendal machinery be entrusted with the right of assent, or veto, is a question which may engage our attention later; but direct and universal participation in governmental functions is a physical impossibility. Hence the idea of political representation.

The House of Commons consists at the present time of 670 members, elected by some 7½ millions of duly qualified electors. Were the principle of equal electoral areas adopted we should have, therefore, one representative for every 11,000–12,000 voters. As a fact, out of 670 members, 377 represent county constituencies, 284 boroughs, and 9 Universities; England (in the narrower sense) claims 465, Wales 30, Scotland 72, and Ireland 103. For membership of the House of Commons there is no longer any property qualification; any male citizen may be elected to serve, unless he is subject to one of several disqualifications. No infant or lunatic can sit in the House of Commons, nor peer (of Scotland or the United Kingdom), nor clergyman of the Church of England, or of the Established Church of Scotland, or of the Roman Catholic Church, nor judge, nor sheriff, nor holders of certain

offices under the Crown, nor Government contractor, nor bankrupt, nor person undergoing sentence for treason or felony, nor person convicted of corrupt practices at a parliamentary election. The point of some of these disqualifications is too obvious to require comment; the origin and significance of others will come before us in subsequent pages.

From the members of the House we may turn to their constituents. Before the Reform Act of 1832 the qualification of electors, at least of borough electors, was extraordinarily various and complex. The Acts of 1832, 1867, and 1884, have defined and simplified it. Under the existing law the parliamentary franchise, or right to participate in the election of members of the House of Commons, is enjoyed virtually by every adult male occupying a house or lodgings of the annual value of £10, and, in the counties, in addition to resident householders, by all owners of real property worth 40*s.* a year.

The distribution of constituencies has also been greatly modified since 1832. Down to that time, as will be shown presently, out of 658 members by far the largest proportion represented boroughs, some of which had sunk into mere hamlets with hardly any electors. Since 1885 the counties and boroughs alike (with the exception of twenty-two boroughs) have been divided up into 617 districts, each returning one member—an approximation to the principle of equal electoral districts.

Such is the present constitution of the Lower House. Its functions are four: (1) it initiates all Bills for the imposition of taxation, and is primarily responsible for the spending of the money thus raised; (2) it shares with the Upper House and the Crown the work of legislation; (3) it has, like the Lords, the right to discuss all matters of public interest; and (4) it enjoys a special measure of control over the Executive: it has a negative voice in regard to the appointment of ministers, and copious if not com-

plete powers of dismissal. Apart, in fact, from legislative, fiscal, and deliberative functions, the House of Commons is what Sir John Seeley has well called a 'Government-making organ'. The acquisition and development of these powers must now be traced historically.

We have seen that the House of Lords traces its origin to the Central Council of the Norman Kings, and through it to the Saxon Witenagemot. For the origin of the House of Commons we must look elsewhere. It is true that the county representatives, or Knights of the Shire, were originally in personnel hardly distinguishable from those *Minores Barones* who, as we saw, were summoned to the National Council by a general writ addressed to the sheriff of each county. But when these *Knights* appear as an important element in the national assemblies of the later thirteenth century it is in a capacity which distinguishes them at once from the *Barons* who were to form the nucleus of the House of Lords. They come, not in virtue of individual pre-eminence, but as representatives of the community of the shire. And they come, frequently after 1265, invariably after 1295, in close conjunction with other representatives, those who come to give financial aid to the Crown on behalf of the citizens of the towns. They come moreover, as we shall see, for a distinct and specific purpose, expressed in the writ of summons.

But first we must understand what led to the adoption, in the England of the thirteenth century, of a political device for which no precedent was to be found in the institutions of the ancient world. The idea of representation had from the earliest times been familiar to our Teutonic ancestors. The primary political unit of the Anglo-Saxons was the *Township*, utilized for ecclesiastical purposes by the great organizers of the Church polity in England as the *Parish*. The affairs of the township or village community were administered by the men of the township in their Moot or

parish meeting. In the courts of the hundred and shire the township was represented as a unit by its reeve (*praepositus*), and four men of the better sort (*quatuor meliores homines*). These same men also represented the township when the King's justices in eyre (or circuit judges) visited the localities. The object of these judicial visitations was threefold: they were intended (1) to keep the central administration (the King's Court) in touch with local administration, (2) to administer justice and preserve order, and (3) to collect the King's dues and, later, to assess taxation. The fiscal and judicial duties of these itinerant justices, or travelling commissioners, were indeed inextricably intertwined. *Justitia est magnum emolumentum.* This aphorism expressed the literal truth. It is not too much to say that from this archaic confusion the idea of political representation gradually emerged. What were the four good men and the reeve of the township doing in the court of the hundred or shire? They were there primarily to answer for the public order of the township, and, secondarily, to answer for its contribution to the public exchequer. In the Shire Court the representatives of this political unit came face to face with the King's Justice—the representative of the central administration. Before the end of the twelfth century a new principle crept in: to the idea of *representation* was added the idea of *election*. According to the *Form of Proceeding on the Judicial Visitation of* 1194, three knights and one clerk are to be elected in each shire to act as *custodes placitorum coronae* or coroners: and the election, be it observed, is to take place in the county court. The introductory clause of the same *Forma Procedendi* is likewise significant as providing for the election of the grand jury. With the idea of representation long familiar to every villager, with that of election becoming more common every day, it called for no great effort of political imagination to suggest the idea of

bringing into the national council representative and elected persons to assent on behalf of their localities to the taxation demanded by the Crown.

This step, almost an obvious one but destined to be of first-rate political importance to England, and indeed to the whole modern world, was first taken in 1213. In that year King John, under the stress of financial and political necessity, summoned, by writ addressed to the sheriff of every county, four discreet knights to attend a national council 'ad loquendum nobiscum de negotiis regni nostri'. A few months earlier he had similarly directed the sheriffs to send to St. Albans four men and the reeve from every township in the royal demesne to assess the amount of compensation to be paid to the bishops who had suffered during the interdict Here, then, we have the origin of county and borough representation in the central assembly of the nation. One or two points are noteworthy. The machinery employed is that which for long time had been familiar: that of the Shire Court and the Sheriff. Again, the four knights of the county and the *four men and the reeve* of the township have an equally familiar sound. From time immemorial these four men and the reeve have represented their townships in the Court of the Shire. Nothing more is now called for but to send them on, at the King's bidding, to St. Albans. Thus by the easiest of stages was the fateful transition from local to national representation accomplished.

Between 1213 and 1295 we have a period of somewhat confused experiment. It is as yet obviously uncertain what direction things will take. The Great Charter of 1215, eminently baronial, not to say oligarchical in tone, does nothing to advance national representation. During the minority of Henry III a struggle ensues between the English Baronage on the one hand, and the Pope and his agents on the other, for supremacy in England. No advan-

tage is likely to accrue from such a contest to the cause of constitutional development. But, nevertheless, the long minority is not void of significance. The Council acquires a new importance. With the young King's personal assumption of the reins of government things begin to hasten towards a crisis. An extravagant weakling, a mere tool in the hands of the Papacy, Henry III soon found himself confronted by an opposition which had some real claim to be regarded as national. A leader of consummate ability presently emerges in the person of Simon de Montfort. As early as 1246 Matthew Paris speaks of a great national assembly in London as a *Parliamentum generalissimum.* The bishops are there, abbots and priors, earls and barons. This is clearly a national council of the old type, though under a new title. To the Council of 1254, however, the King summons, again by writ addressed to the sheriffs, two knights to be elected in each county court, to inform the King what aid he may expect from the counties for the relief of his pressing financial embarrassments (*quale auxilium nobis in tanta necessitate impendere voluerint*). The year 1261 affords still more significant proof of the increasing importance of these county representatives. The Barons, now in open opposition, summoned three knights from each shire to meet them at St. Albans 'to treat of the common business of the realm'. The King, on the contrary, bade the sheriffs dispatch the knights to him at Windsor. To the Parliament of 1264 four knights from each county were summoned. To the famous Parliament of 1265 Simon de Montfort, in the King's name, summoned five earls and eighteen barons, a large body of clergy, two knights from each shire, and two citizens from each of twenty-one specified towns. On the strength of this assembly Simon has been styled the 'founder of the House of Commons'. That title cannot be justly attributed to any single man; not even to Edward I, certainly

not to Simon de Montfort. It is true that for the first time representatives of the towns were brought into political conjunction with barons, knights, and clergy. The conjunction is significant. But, more closely examined, the assembly of 1265 is seen to 'wear very much the appearance of a party convention' (Stubbs). Of barons there were only a handful—the partisans of Simon; of the clergy—his strongest supporters—a large and wholly disproportionate number; of the towns, only twenty-one, as compared with one hundred and ten summoned in 1295 by Edward I. The towns, moreover, were selected with obvious care, and the writ was directed not to the sheriff of the county, but to the mayors of the chosen towns. There is good ground, therefore, for the cautious insinuation of Bishop Stubbs. None the less, Simon's Parliament, whatever the motives of its convener, does mark an important stage in the evolution of the House of Commons.

From 1265 to 1295 we are once more in the region of uncertainty and experiment. There were several 'Parliaments' after the battle of Evesham, but whether knights and burgesses were included in them we cannot tell. In 1273 four knights from each shire and four citizens from each town joined the magnates in taking the oath of fealty to the absent King. The Statute of Westminster the First (1275) is, on the face of it, made with the assent of the 'community of the realm' as well as the magnates lay and ecclesiastical. In 1282 a curious experiment is tried. The King and the magnates being in Wales, the sheriffs are bidden to summon to York and Northampton respectively representatives of the towns and counties, together with 'all freeholders capable of bearing arms and holding more than a knight's fee'. The Archbishops of the two Provinces are similarly enjoined to summon through the bishops the heads of the religious houses and the proctors of the cathedral clergy. For an instant it seemed as though

the ecclesiastical provincialism of the Church might overbear the tendency to nationalism. The experiment was not indeed repeated, but the jarring tendencies of provincialism and nationalism were not yet reconciled, nor the victory of one or other assured. In September 1283 two knights were summoned to a national council together with two 'wise and fit' citizens from London and twenty other specified towns. Here it will be observed that Edward I followed exactly the precedent of 1265, both as to the number of towns and the mode of summons, the writs being addressed to the mayors and bailiffs. In the Parliaments of 1290 and 1294 the towns were left out; with that of 1295, however, we reach the close of the experimental period and the real beginnings of regular parliamentary history.

The model Parliament of 1295 was a full and perfect representation of the three Estates—Baronage, Clergy, and Commons. With Baronage and Clergy we are no longer concerned, but we have still to see how the knights and burgesses, and they only, came to form a 'House of Commons', while the magnates, lay and ecclesiastical, were definitely organized in a 'House of Lords'. Two things facilitated the evolution of a bicameral Legislature. The lower clergy declined to take the place designed for them by Edward I as a constituent element in the national Council, and preferred to vote their grants to the Crown in their two provincial Convocations. The 'knights', after some not unnatural hesitation, definitely threw in their lot with the burgesses. Socially drawn to their kinsmen in what came to be known as the 'Upper' House, they were from the first politically associated with the representative townsmen who, like themselves, were elected in the Court of the Shire. By the middle of the fourteenth century things had settled down, and the bicameral formation with which we have long been familiar had been definitely evolved.

But the writs show clearly that the two Houses were not,

and were not intended to be, on an equality. The Magnates[1] were summoned *tractaturi vestrumque consilium impensuri*: to treat with the King in the affairs of the realm and give him their advice. Knights and Burgesses were directed to come *ad faciendum et consentiendum*: to do and consent to that which is decided upon by the King and the Magnates. In the course of the fourteenth century, however, three fundamental rights were gradually but unmistakably established, rights in which the Commons had, to say the least, full and equal part:—(i) the control of taxation, both direct and indirect; (ii) a concurrent right of legislation; and (iii) the right to criticize and in some sort to control the doings of the Executive.

To assist the King in his financial necessities was the primary object with which representative knights and burgesses had been summoned to the National Council in the thirteenth century. Down to that time the ordinary revenues of the Crown—the rents of Crown lands, the profits of justice, escheats and forfeitures, feudal rights and the like—had all but sufficed for the ordinary expenses of government. They were supplemented from time to time by a land-tax, dane-geld, carucage, scutage, and from the reign of Henry II by a tax on personal property (*mobilia*); but, generally speaking, the King was able 'to live of his own'. But the expenses of government, even in the Middle Ages, showed a constant tendency to increase, and from the thirteenth century onwards taxation became a regular part of the machinery of government.

Originally each Estate was fiscally independent. The clergy maintained the right of separate taxation with ever-watchful jealousy until the seventeenth century. As regards the rate, it became usual for the clergy to follow the example

[1] The Magnates occupied a double position: (i) Counsellors of the King for deliberative purposes; (ii) an Estate of the realm for legislation and taxation.

of the other Estates, but there was to be no confusion as to its origin. Thus in 1449 the Commons, in making a grant to the Crown, so far presumed as to take into account the complaisant gift of the clergy. They were at once sharply reminded by the King that the right of taxing the clergy belonged not to them but to the two provincial Convocations; and so matters remained until this important privilege was surrendered by a verbal agreement between Lord Chancellor Clarendon and Archbishop Sheldon in 1663.

It was otherwise with the two other Estates. Before Parliament was a century old it had become usual for Lords and Commons to combine in their grants of 'tenths and fifteenths', 'tonnage and poundage,' and in other imposts, and by the close of the fourteenth century the Commons had begun to establish a pre-eminence never since questioned. A new formula comes into use in 1395, which has since been used without variation; grants are made '*by the Commons with the advice and assent of the Lords Spiritual and Temporal*'. The Lords henceforward take an increasingly subordinate position in regard to taxation. In 1407 an incident occurred which has been generally regarded as having established a still more important right of the House of Commons,—that of initiating all Money Bills. In the Parliament of Gloucester the Commons expressed themselves as greatly disturbed by the action of the House of Lords in fixing the amount of a grant to the King, 'saying and affirming that this was in great prejudice and derogation to their liberties.' King Henry IV yielded the point, apparently with the assent of the Lords, and agreed 'that neither House should make any report to the King on a grant made by the Commons and assented by the Lords; or on any negotiations touching such grants until the two Houses had agreed; and that then the report should be made by the mouth of the Speaker of the Commons'. This

has been generally taken to establish the claim of the Commons to initiate all money grants to the Crown. Whether this vast superstructure of privilege can be maintained upon foundations so comparatively slender may perhaps be questioned; but there is no doubt at all that from this moment the theory of taxation by Estates rapidly faded, and that the financial pre-eminence of the Commons became more and more marked.

Meanwhile Parliament as a whole was making good its privileges as against the Crown. By the *Confirmatio Cartarum* (1297) the principle was asserted that no 'aids, tasks, and prises' should be taken by the Crown 'but by the assent of the realm and for the common profit thereof, saving the ancient tasks and prises due or accustomed'. But though the general principle was thus asserted, a good many loopholes were left to the Crown, and these it was the business of the fourteenth century to stop up. The King having continued to collect the accustomed feudal dues and tallage from the towns on the ancient demesne of the Crown, a specific statute was passed in 1340 that 'henceforth no charge or aid should be imposed on the nation except by common assent of the prelates, earls, barons, and other magnates and the Commons of the realm assembled in Parliament'. This closed the door effectually to direct taxation without parliamentary consent. Indirect taxation presented a more difficult problem. The *Confirmatio Cartarum* forbade any *male tote* or increase in the accustomed duties on wools, woolfels, and leather, granted to the King in 1275. But 'customs' were long regarded as fees paid by merchants for licence to trade, and were collected by the King by direct negotiation with the merchants. It needed decided action on the part of the Commons to arrest this dangerous practice. By an Act of 1362 it was provided that henceforward 'no subsidy or charge should be set upon wool by the merchants or any other body without consent

of Parliament'; and there was further legislation on the same point in 1371 and 1387. But that it was not definitely cleared up, the disputes about 'impositions' and 'tonnage and poundage' were to prove under the first two Stuarts. Generally speaking, however, it is safe to say that by the end of the fourteenth century it was definitely established that there should be no 'taxation' without consent of Parliament.

Legislation was a matter of less immediate importance, but during the same period the right of both Houses to concur in the making of laws was no less clearly established. In this matter the Commons were, at first, in a position of marked inferiority, a fact clearly revealed by the legislative formula for the enactment of Statutes. Such Statutes were said to be made *by* the King, with the *assent* of the Magnates at the *request* of the Commons. The Commons, in fact, are *petitioners*, and on their petition Statutes are founded by the enacting parties. But the assent of the Commons is, nevertheless, essential. By the Act revoking in 1322 the new ordinances of 1310, it was acknowledged that all matters 'shall be treated, accorded and established in parliaments by our lord the King, and by the assent of the prelates, earls and barons and the Commonalty of the realm'. This historic declaration is generally taken to have established the legislative equality of the Commons. But if such was indeed the theory, the practice was widely different. Not until the reign of Henry VI did the Commons obtain any really effective control over legislation, and it was obtained by an alteration of procedure which had its counterpart in an alteration of formula. Legislation is still the act of the King, but since the fifteenth century such Acts have invariably been made 'by the King's most excellent majesty by and with the advice of the Lords, spiritual and temporal, and Commons in this present Parliament assembled and by the authority of the same'.

The essential change was effected when Parliament secured the right of legislating by Bill instead of by petition. All through the fourteenth century there is evidence that the Commons were endeavouring to secure that the Statute in its final form should correspond to the petition on which it was based. Various devices were adopted to secure the honest enrolment of petitions, but none were really effective. Henry V granted 'that from henceforth nothing be enacted to the petitions of his Comune that be contrary to their asking, whereby they should be bound without their own assent. Saving always to our liege lord his royal prerogative to grant and deny what him lust of their petitions and askings aforesaid'. But there were still slips between the cup of petition and the lip of statutory enactment. At last, however, towards the end of the reign of Henry VI, procedure was altered and the point for which the Commons had long striven was attained. Henceforward, Bills were introduced in the form of draft Statutes, in either House. The tables were now turned; the right of initiation was secured to the Commons, concurrently with the Lords; the Crown was restricted to a right of veto or assent.

But there was yet another obstacle to the complete recognition of the Commons' rights in legislation. Even after Parliament in its modern shape had come into being the King-in-Council continued to issue *Ordinances*, which differed from *Statutes* by the fact that they were intended to be of a temporary instead of a permanent character, and that they were issued in letters patent and were not engrossed on the Statute roll. Early in the fourteenth century the Commons began to manifest their jealousy of the legislative functions of the Council. Only the rights of the Commons were substantially infringed, for to the Lords it mattered little whether they legislated in Parliament or in Council. Thus in 1389 the Commons prayed that the Chancellor and Council might not make ordinances cor-

trary to the Common Law and Statute. From Richard II they got little comfort: but under the Lancastrians there was no conflict between Parliament and Council, and nothing more is heard of the matter. The Tudors, notably Henry VIII, exercised the right of issuing *Proclamations* (Ordinances under another name), though within limits imposed by Parliament; under the Stuarts the question was one of those most hotly debated between Crown and Parliament. The fall of the Monarchy decided it, and after the Restoration no attempt was made to deny the omnipotence and exclusiveness of the legislative authority of Parliament.

But taxation and legislation did not exhaust the activities of Parliament even in the fourteenth century. Thus early did it put forward a claim to criticize the acts of the Administration, and to bring to account the Councillors and Ministers of the Crown. The *Ordinances* of 1311 provided for the appointment of Ministers in Parliament; but they were revoked in 1322. Again, in 1341, Edward III, to secure a grant from Parliament, promised that Ministers and judges should be appointed in Parliament; but the Statute was hardly passed before it was annulled. In 1371 the resignation of William of Wykeham looks like a premature recognition of the principle that Ministers must possess the confidence of Parliament; but the time was not yet. In 1376, however, a new form of judicial procedure, apt to bring to justice powerful offenders, was introduced. In that year the Commons impeached at the bar of the Lords' certain of the King's Ministers, and, in 1386, the same machinery was employed against Michael de la Pole, Earl of Suffolk.

But never were the relations of Legislature and Executive so close as under the early Lancastrians. In 1404, 1406, and 1410, Henry IV actually nominated the members of his Council in Parliament, and in 1422 it was Parliament which nominated the Privy Council to be a Council of

Regency during the minority of Henry VI. But the experiment, though daring, proved to be premature. Parliament was not yet ready to take upon itself the high responsibility of the control of the Executive. Nor was the nation at large ready for such a weakening of the power of the Executive as is involved in the modern notion of Parliamentary Government. The premature experiment issued in the social anarchy which eventually took shape in the Wars of the Roses. But by this time Parliament had assumed its modern shape, and acquired, in outline at any rate, all the powers it now enjoys. At this point, therefore, we may temporarily pause. Organized solidly in two Houses, it had definitely acquired the right to assent to all taxation ; to concur in the making of laws, and to control in some measure, if not to appoint, the agents and ministers by whom the actual work of administration was carried on. With the close of the fifteenth century and the accession of the Tudor Sovereigns we leave behind us the atmosphere of antiquarian origins, and find ourselves confronted by problems which are those of the modern world.

CHAPTER IX

THE LEGISLATURE: (4) THE HOUSE OF COMMONS UNDER THE TUDORS AND STUARTS

'Long before Hobbes had formulated his defence of absolutism, the philosophical notion of indivisible sovereignty emerged, if at first but dimly, into the field of practical politics, and was interpreted by lawyers and politicians in opposing senses. A question was in this way raised which went to the roots of government and was not settled till the Revolution.'—G. W. PROTHERO.

'And contrarywise, with all humble and due respect to your majesty our sovereign lord and head, against those misinformations we most truly avouch,—first, that our privileges and liberties are our right and due inheritance, no less than our lands and goods; secondly, that they cannot be withheld from us, denied or impaired, but with apparent wrong to the whole state of the realm: thirdly, and that our making of request, in the entrance of Parliament, to enjoy our privilege, is an act only of manners. . . .'—*The Commons' Apology of* 1604.

IN the last chapter we investigated the origins of the House of Commons, and sketched its development in structure and powers to the close of the Middle Ages. The dawn of the modern era—marked in England by the accession of the Tudors—reveals the nation socially distraught, economically anaemic, and with its Parliamentary constitution seriously overstrained. Nation and Parliament had, in fact, alike outgrown their strength; they were both constitutionally sound, but they needed time for rest and recuperation. They obtained it under the firm disciplinary administration of the Tudor Monarchy, and emerged from it braced and invigorated for the struggle which lay before them in the succeeding century.

As regards Parliament and more particularly the House of Commons, the significance of the Tudor period has been

gravely underrated. It is not a period of rapid development, like the thirteenth century or the fourteenth; still less of premature experiment, like the fifteenth; but it is not too much to say that, but for the peculiar characteristics of the Tudor dictatorship; but for the strong hand of a despotism carefully veiled under the forms of law, the English Parliament might have gone the way of the Spanish Cortes and the States-General of France. Had the Tudors been weak and nerveless Constitutionalists like the Lancastrians, English parliamentary institutions might possibly have perished in the welter of social anarchy and dynastic strife. Had they been despots regardless of legal forms and contemptuous of constitutional formulae, Parliament would never have been in a position to wage a successful contest with the Crown in the seventeenth century. It was the combination of strong administration and scrupulous adherence to the outward ceremonial of constitutional observance which preserved from death, either by inanition or violence, institutions which have proved themselves of incomparable value to the Anglo-Saxon race.

Alike in the failure of the premature political experiment tried by the Lancastrians; in the success of the New Monarchy of the Tudors; and, not least, in the conspicuous triumph of Parliament in its contest with the Stuarts, there are lessons of the highest significance for the philosophical student of institutions. It is the primary purpose of this chapter to enforce them.

When Henry VII ascended the throne in 1485, he found himself confronted by a Parliament organized on a bicameral basis, and possessed of indisputable rights over taxation and legislation, and certain less-defined rights in regard to the criticism and control of the Executive. Of the constitution and form of the Upper of the two Houses we have already spoken; what was the constitution of the Lower?

It consisted of two sections (1) 74 Knights of the Shire,

who represented 37 English counties, Monmouthshire and the Counties Palatine of Chester and Durham being unrepresented, and (2) an indeterminate number of discreet men who represented cities and boroughs. In the writs addressed to the sheriff of each county in 1295, and afterwards, he was bidden to procure the election of 'two knights from his county, and two citizens from each city and two burgesses from each borough within the aforesaid county'. To some extent this would seem to have left a certain discretion to the sheriff; and the varying number of boroughs actually represented in different parliaments confirms the idea that discretion was freely exercised. In the Parliament of 1295, 166 towns appear to have been represented; but this number was not maintained in later parliaments, and under Edward IV it had fallen to 111. It must be remembered that parliamentary representation was at first regarded rather as a burden than as a privilege; and a burden which entailed considerable financial responsibilities was, presumably with the connivance of the sheriff, not infrequently evaded. The wages paid to burgesses were 2*s.* and to the knights 4*s.* a day, during their sojourn in Parliament, including the journeys to and fro.

By whom were the borough Members elected? To this question no positive or uniform answer can be given. The qualification of electors varied from borough to borough, and was never reduced to uniform practice until 1832. In some towns the franchise was exercised by all ratepayers ('scot and lot' boroughs), in others by the holders of particular tenements ('burgage franchise'), in others by the Municipal Corporation, or some specially privileged oligarchy; in others by every one who had a hearth of his own ('potwalloper' boroughs). Thus the qualification varied from the widest democracy to the narrowest oligarchy. In some places the election was direct; in others, an electoral body was itself elected. But whatever the local qualifica-

tion of electors, the formal election, or notification of the election, took place in the Shire Court, and by the Sheriff all returns were made. There also, *in pleno comitatu*, the Knights of the Shire were elected, apparently (though the point is not free from ambiguity) by the general body of the freeholders of the county.

An Act of 1406 (7 Hen. IV, c. 15) removed all possible doubt by providing that knights should be elected by 'all persons present at the County Court as well suitors summoned for any cause as others'. But this broad practice apparently did not work satisfactorily, and in 1430 an amending Act was passed, under which the county franchise was restricted to residents in the county owning freehold lands or tenements of the nett annual value of 40*s*.—equivalent, perhaps, to some £30 to £40 in present values. The reason for the change, according to the preamble of the Act, is declared to be that 'the elections of Knights of Shires have now of late been made by the very great and outrageous number of people either of small substance or of no value, whereof every one of them pretended to have a voice equivalent as to making such elections with the same worthy knights and squires dwelling within the same county'. Be the reason good or bad, the fact remains that the Act of 1430 continued to define the county franchise for just four hundred years, while in the boroughs, during the same period, variety and ambiguity reigned supreme.

Not until 1832 was there any general enactment regulating the qualification of electors in counties and towns respectively. Meanwhile, there were important changes in the number and character of the constituencies by which Members were returned to the House of Commons. The tale of the English counties was completed by the inclusion of Monmouth (1536), the Palatine county of Chester (1543), and that of Durham (in 1673). Monmouthshire came in as part of a general scheme for the Parlia-

mentary representation of Wales. The Act of 1536, which gave two members to Monmouth, gave one to each of the twelve[1] Welsh counties and one to each of the chief towns. Henry VIII also gave representation (two members apiece) to the following towns:—Calais, Berwick-upon-Tweed, Buckingham, Chester, Lancaster, Newport (Cornwall), Orford, Preston, and Thetford. By the end of his reign the county representation had been increased from 74 to 90, and that of the boroughs to 253, bringing the total membership of the House to 343. Against this increase of numbers no sinister motive could be alleged. The concession of Parliamentary representation to Wales did but carry to a logical conclusion the Unionist policy of Edward I; the inclusion of Cheshire and Monmouthshire removed an antiquarian anomaly, while the new Parliamentary boroughs were places of considerable and growing importance.

Of the creation of new boroughs by Edward VI or his Protectors it is impossible to speak with the same confidence. In his short reign no fewer than twenty new constituencies were created. To some of the towns thus enfranchised, such as Westminster, Liverpool, Wigan, Maidstone, Lichfield, and Peterborough, no exception could be taken. But many of the new boroughs were in Cornwall, and although the fishing towns in that county were in the sixteenth century rapidly increasing in importance, it is difficult to resist the conclusion that Cornwall was specially favoured as a royal Duchy and as being on that account particularly amenable to royal influence. This suspicion is deepened when we find the Protector Northumberland, in issuing letters of instruction to the sheriffs, actually going so far as to indicate the names of the persons whom the Crown wished to be returned. Queen Mary created twenty-one constituencies, three of them single-membered, but Calais,

[1] Five out of the twelve being at the same time created out of the Marcher Lordships.

of course, ceased to return representatives, so that the permanent nett increase in the membership of the House was nineteen. She also instructed the Sheriffs to admonish the electors to choose 'such as being eligible by order of the laws were of a grave, wise, and catholic sort', but no names were mentioned. Queen Elizabeth exhibited a similar solicitude as to the personnel of the House of Commons. Thus in 1570 she complained that 'though the greater number of knights, citizens, and burgesses for the most part are duly and orderly chosen, yet in many places such consideration is not usually had herein, as reason would, that is to choose persons able to give good information and advice for the places for which they are nominated, and to treat and consult discreetly upon such matters as are propounded to them. The Queen, therefore, appointed Archbishop Parker and Lord Cobham to confer with the Sheriff in Kent and to take care that the persons returned 'be well qualified with knowledge, discretion, and modesty'. Queen Elizabeth also was bounteous in the bestowal of Parliamentary privileges, no fewer than sixty new members being added during her reign to the House of Commons.

Thus during four Tudor reigns 166 members were added to the House of Commons.

James I gave representation to the Universities of Oxford and Cambridge, and added twenty-three borough members to the House; Charles I eighteen,[1] while Charles II, besides bringing in the county Palatine of Durham, gave members to the city of Durham and the borough of Newark. The total Stuart addition was, therefore, fifty-one, making for the sixteenth and seventeenth centuries a grand total of 217. Apart from the Scotch and Irish Unions there was no further addition to the membership of the House of Commons until 1832, a period of more than a century and a half.

[1] Many of the boroughs enfranchised under the early Stuarts were, it should be noted, revivals, not new creations.

With what object did the Stuart, and still more the Tudor, Sovereigns add so largely to the House of Commons? To this question two answers may be, and have been, given. The older generation of historians, who could see in the Tudors nothing but wilful and overbearing despots, naturally find in this proceeding evidence of an attempt to pack the House of Commons and render it a pliable instrument in the hands of the Crown. That it was an integral part of Tudor policy to rule in and through Parliament is undeniable; that sinister motives were altogether absent it would be difficult to prove. The special favour shown to Cornwall, even if account be taken of the economic circumstances of the day, is, to say the least, suspicious. On the other hand the Tudors were notoriously anxious both to clip the wings of an over-powerful aristocracy and to counterbalance their political power by encouraging the growth of a strong middle class. The wealth of the commercial classes increased rapidly in the sixteenth century, and nothing was more natural than that the trading and fishing towns from which this wealth was derived should find representation at Westminster. Nor should it escape notice how many of the newly-enfranchised towns—Liverpool, Looe, Fowey, Yarmouth (I.W.), Newport and Newtown (I.W.), Minehead, Harwich, Seaford, Corfe Castle, for example—were on the seaboard. Others, like Preston, Wigan, Thetford, Bury St. Edmunds, Peterborough, Cirencester, were towns of growing commercial importance. On the whole, therefore, it is not less consistent with probability and more consistent with charity to assume, with Dr. Prothero, that the main reason for the increase is to be found 'in the growing prosperity of the country and in the reliance which the Tudors placed on the commercial and industrial classes'.[1]

The discussion of this question leads naturally to a con-

[1] *Statutes and Documents*, p. lxvi.

sideration of the general position of the House of Commons under the Tudors. To discuss it in detail would be beyond the scope of this work, but one or two points may be summarily noticed.

First, whatever may be thought of the constitutional attitude of the Tudor sovereigns and the general motives which inspired their policy, it is incorrect to regard the sixteenth century as creating a constitutional hiatus in the otherwise continuous development of English institutions. On the contrary, that period yields to no other as regards the importance and continuity of constitutional development. But the growth was of a peculiar kind. It was in breadth, not height. It was marked not by the assertion of new privileges, but by the essential confirmation of existing ones. Thus, in the first place, though the Tudors desired to be supreme in Parliament, as elsewhere, there was no attempt to supersede its authority, nor to neglect it. Throughout the whole period Parliament assembled, not of course with the regularity of to-day, but without long intervals. During Henry VII's reign there were seven sessions; under Henry VIII there were nine distinct Parliaments, of which one sat continuously for seven years, and two others for three. During the short reigns of Edward VI and Queen Mary, Parliament met practically every year. Elizabeth was more economical than her immediate predecessors and had, therefore, less need of Parliaments, but there were ten Parliaments during the reign, with thirteen sessions in all.

Secondly, the Tudors, unlike the Stuarts, always gave their Parliaments plenty to do, thus anticipating the sagacious advice tendered by Bacon to James I.[1] Tudor Parliaments could not complain of an empty stomach. No period down to the Victorian era was so fertile in legislation of an important character. The statute-book of the sixteenth century groans under the weight of enactments

[1] See p. 47.

on matters Social, Economic, and Ecclesiastical. 'The part,' writes Dr. Maitland, 'which the assembled Estates of the realm have to play in the great Acts of Henry VIII may in truth be an ignoble and subservient part, but the Acts are great and they are all done by the authority of Parliament.' The point is one which cannot be illustrated in detail, but its significance must not be ignored. Whatever accusation may be urged against the Tudors, at least they cannot be charged with legislative infertility or with unreadiness to propose to Parliament 'interesting and imposing points of reform'.

Nor did they display any lack of consideration for the susceptibilities of Parliament in regard to taxation. Money was obtained from many sources which were extra-parliamentary, but not even by the most wilful of the Tudors was there any violation of the right of Parliament to control taxation. Henry VIII, it is true, repudiated his debts, but the repudiation had the sanction of Parliament; even Wolsey recoiled before the resistance of the House of Commons to excessive demands for subsidies, while Elizabeth, in the one serious dispute on a financial question between herself and the Legislature, made her concession with a grace which served to cement the bonds between Crown and Parliament.

Similarly in regard to legislation. No attempt was made to question the formal supremacy of Parliament. But the Crown, nevertheless, got all it wanted. It possessed the invaluable prerogative of initiation; the veto was freely exercised, and short of this the Crown could bring pressure to bear on a recalcitrant member to withdraw an obnoxious Bill. Queen Elizabeth, indeed, went so far as to commit Peter Wentworth and Strickland to prison for untimely persistence in the pursuit of legislative reform. In *Proclamations*, too, the Tudors found a useful means of evading, without violating, the legislative control of Parliament; but the

device, it should be noted, had been legalized by Parliament itself.

Similarly circumspect and tactful was the way in which the Tudors dealt with the delicate question of parliamentary privilege. Henry VIII was technically accurate when he wrote to the Pope in 1529: 'The discussions in the English Parliament are free and unrestricted; the Crown has no power to limit their debates, or to control the votes of their members.' But his letter should be read in close conjunction with Queen Elizabeth's famous warning to her faithful Commons in 1593. 'To your three demands the Queen answereth: . . . Privilege of speech is granted, but you must know what privilege you have; not to speak every one what he listeth, or what cometh in his brain to utter that; but your privilege is, *aye* or *no*. . . . To your persons all privilege is granted, with this caveat, that under colour of this privilege no man's ill-doings or not performing of duties be covered and protected. The last; free access is granted to Her Majesty's person, so that it be upon urgent and weighty causes, and at times convenient, and when Her Majesty may be at leisure from other important causes of the realm.'[1] This is admirably illustrative of Tudor methods: there is no infraction of constitutional privileges, no violation of the law, but strict limitation of the sphere of privilege, and dexterous evasion of legal restraints. The Tudors, it must be remembered, enjoyed in their dealings with Parliament some conspicuous advantages. The first was the virtual nomination of the Speaker of the House of Commons. The Speaker's position in the sixteenth century was, of course, entirely different from what it is to-day. His control of the proceedings was all but absolute, and until the development of the ministerial system he was the sole channel of communication between the House and the Crown. How great was the importance

[1] *D'Ewes Journal*, f. 460.

attached to the election of a Speaker well affected towards the Crown may be clearly seen from Clarendon's account of the opening of the Long Parliament. The King had designated Sir Thomas Gardiner—the Recorder of London—for the office; but Gardiner, probably for this reason, failed to secure election in the city, and Lenthall—a man of very different temper—was elected Speaker in his place. Clarendon refers to the matter as 'an untoward, and in truth an unheard of accident, which broke many of the King's measures, and infinitely disordered his service beyond a capacity of reparation'. Clarendon may have exaggerated the damage done to the King's cause, but the notes of parliamentary debates under the Tudors afford ample evidence of the great services rendered to the Crown by successive Speakers.

Hardly less important was the increasingly frequent presence of the members of the Privy Council—the trusted servants of the Crown—in one or other House of Parliament. We must be at some pains to apprehend the significance of this. The books teach us that the presence of Ministers in the English Parliament is at once the symbol and the seal of the control of the Legislature over the Executive. It was not so regarded by our forefathers, and in the sixteenth century its significance was all the other way It was a powerful instrument in the hands of the Executive for influencing the Legislature. Is it quite certain that even now the 'books' are right? Were the fathers of the American Commonwealth altogether unwise in their generation? Is not the increasing power of the Executive in the sphere of legislation no less than in that of administration the most significant of the constitutional symptoms of to-day?[1] And to suppose that in the sixteenth century Parliament pretended to any effective control over the Executive, or that the presence of the Ministers indicated any tendency

[1] Cf. S. Low, *Governance of England* (1905).

in that direction, would imply an absurdly anachronistic reading of history. Dr. Prothero has extracted from the State Papers an interesting memorandum on the duties of a Secretary of State under Queen Elizabeth. Cabinet Ministers of to-day would read it with envy. Doubtless Mr. Peter Wentworth, Mr. Cope, and Mr. Strickland were tiresome persons in their way, but they were mere tyros in the art of parliamentary 'heckling', and they were at one terrible disadvantage as compared with their modern counterparts. No 'papers' were ever laid on the table of the House. No 'reports' were presented to Parliament. Under these circumstances it would tax the ingenuity even of the most accomplished 'hecklers' of to-day to carry on their persistent fusillade. Nor has the most autocratic of modern Ministers ever ventured to re-echo the language of the Lord Keeper of 1593: 'Wherefore, Mr. Speaker, her Majesty's pleasure is, that if you perceive any idle heads, which will not stick to hazard their own estates, which will meddle with reforming the Church and transforming the Commonwealth, and do exhibit any bills to such purpose, that you receive them not, until they be viewed and considered by those who it is fitter should consider of such things and can better judge of them.'[1]

A pertinent question still remains to be answered: What was the effect of the Tudor period, as a whole, upon the position of the House of Commons? Did it emerge from the sixteenth century nerveless and limp; atrophied in its members by disuse, or crushed beneath the weight of a blasting despotism? We have only to glance at the terms of the famous *Apology* drafted in the first Parliament of James I to convince ourselves that these questions must be answered by an emphatic negative. The Tudor régime was not merely disciplinary, but educative, and the House of Commons emerged from the period neither crushed nor

[1] *D'Ewes Journal*, f. 460 (Prothero's Documents).

emasculated, but braced, stimulated, and invigorated; confident in its powers; and eager to do battle for its privileges with the luckless rulers who, through successors in title to the Tudor monarchs, were not permitted to inherit the Tudor monarchy.

The seventeenth century is of all periods the most critical in the history of Parliament. From first to last—from the Apology of 1604 down to the Bill of Rights and the Act of Settlement—it is a period of conflict, and the prize for which the contest was fought was the Sovereignty of England Was that Sovereignty to remain vested in the Crown; or to be transferred to the people; or to be exercised by a Parliament consisting of King, Lords, and Commons? The Crown was striving to retain, Parliament (in the more restricted sense) was striving to acquire, supreme authority. That the Crown of England had always been in a sense 'limited' has been already shown[1]: but on that ground to represent the action of Parliament in the great contest of the seventeenth century as strictly 'Conservative' seems strangely pedantic. Most people are now willing to admit that at the beginning of the seventeenth century the time had come for a real shifting in the balance of the Constitution—a change in the political centre of gravity from the Crown to Parliament; but to minimize the extent of the change would seem to be both unhistorical and uncandid.

The general aspect of the struggle has been already described, and its details must not now detain us. It must suffice to point out that there was no recognized sphere of parliamentary activity into which the Stuart Kings did not wish to intrude, and no parliamentary function the exercise of which they did not in practice contest. Taxation, legislation, free deliberation on public affairs, criticism and control of ministerial action—on each of these questions Parliament came into conflict with the first two Stuart Kings.

[1] See *supra*, c. iii.

It is only fair to both parties to point out that the conflict arose from several concurrent causes which were, in a sense, beyond the immediate control of either party to the quarrel.

It arose, in the first place, as we have already attempted to show, from the circumstances of the time. The Tudor discipline had been applied at the precisely opportune moment; it had arrested premature parliamentary development; it had repressed aristocratic disorder and had encouraged the growth of the middle class; it had given opportunity for commercial and maritime enterprise; and had, by its reorganized local government, afforded the country gentlemen an invaluable training in practical administration. All these things told on the life of the nation at large, and the value of the discipline was clearly revealed in the political conflict of the succeeding century.

But the political problem did not stand alone. Had it done so revolution might none the less have come, but the revolution would have been bloodless. The sixteenth century bequeathed to the seventeenth an ecclesiastical as well as a constitutional problem. Men's religious passions were deeply roused. Charles I and his party wished to preserve a National Church, organized under an episcopate ruling by virtue of a succession unbroken since apostolic times, and adhering as closely as circumstances allowed to the 'Catholic' tradition of discipline, ritual, and doctrine. His opponents wished to carry the Reformation a stage further on the lines suggested by the continental Protestants; to abolish episcopalian government and Catholic doctrine, and to substitute the rule of Geneva. But for the attack upon the episcopalian government of the English Church Charles I would have been compelled to yield on the constitutional question; the Long Parliament would have achieved a bloodless triumph, and the civil war would never have been fought.

A third cause of conflict was the ambiguity of much of our constitutional law, an ambiguity which was intensified by the peculiar circumstances of the preceding century. Much had been allowed and even forgiven to the Tudors, because they gave the nation the efficient administration demanded during a period of national stress. In the process constitutional law, never too clearly defined, had become still further blurred. In regard to many points of primary importance it required to be restated. To this ambiguity no small part of the conflict must in fairness be ascribed.

The control of the House of Commons over national finance is an instance in point. That taxes could not be levied without the consent of Parliament was a constitutional aphorism dating at least from the fourteenth century. Various loopholes discovered by the practice of that period had, as we have seen, been carefully stopped up. Later on, the Commons had secured, as further safeguards, the right of initiation and the right of audit. But how far did the theory of *taxation* extend? Were custom duties included in it? Licences to carry on foreign trade were admittedly within the competence of the Crown to issue or withhold; but if so, might not some charge be imposed for the exercise of the privilege? The Commons of the fourteenth century had, as we have seen, made short work of the contention. But Tudor practice had blurred the sharpness of outline, and the Stuarts, greatly straitened in their resources by the rise in the value of money, clutched eagerly at *Impositions* as a legitimate source of extra-parliamentary revenue. The legality of these impositions, or additional custom duties, was brought to the test in the famous case of Bate, a Levant merchant, who refused to pay the duty of 5*s.* per cent. on currants imposed by the Crown. The judgement of the Court of Exchequer (1606) was in favour of the King, and a commission was accordingly issued (1608) by the King

for the collection of customs according to a fixed scale. Strictly analogous is the still more famous case of ship-money. Was this ancient 'geld' to be regarded as a 'tax'? That the circumstances under which it was levied by Charles I in 1634 gave to ship-geld all the characteristics of a tax cannot be denied; but as in the case of Bate, so in that of Hampden, the judges decided in favour of the Crown. It is easy to assert that these famous judgements tend only to prove the 'servility' of the judicial bench. But though the fact may be true, the explanation is inadequate. No fair-minded critic can read the actual judgements delivered without perceiving that there was a real ambiguity as to the limits of the royal prerogative; that the law itself was defective and required amendment. It could not be denied that the Crown was the residual legatee of certain undefined powers known as the *Prerogative*. How far did prerogative extend? Did it include the control of foreign trade, and the provision of national defence? If so, could the court refuse to accept the logical consequences as expressed in the impositions levied on Bate, or the ship-geld collected from Hampden? The ambiguity was one for the Legislature to clear up. This was done partially by the Petition of Right (1628), less definitely in the abrogation of the ship-money judgement in 1641, and most effectually by the following clause (ii, 5) in the Bill of Rights (1689): 'That levying money for and to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time or in other manner than the same is or shall be granted, is illegal.' Thus was the last loophole finally closed.

Legislation presented a similar though less irritating problem. The concurrent rights of the House of Commons had been acknowledged theoretically in the fourteenth century, practically in the fifteenth. But there still remained to the Crown the loophole of 'Ordinances' which virtually

reappear under the Tudors as 'Proclamations'. The latter formed a useful and indeed indispensable part of the dictatorial machinery of the sixteenth century; the Stuarts sought to apply it to less popular purposes in the seventeenth. In the reign of Queen Mary the judges laid it down that 'the King may make a proclamation *quoad terrorem populi* to put them in fear of his displeasure, but not to impose any fine, forfeiture, or imprisonment; for no proclamation can make a new law, but only confirm and ratify an ancient one'. No such limitations were observed by James I, who employed this machinery to forbid the election of outlaws; to withdraw Parliamentary representation from decayed towns; to levy new custom duties; to restrain building operations in London, and for various other purposes. Parliament remonstrated against this infringement of their legislative rights in 1610. James referred the question to the judges, who declared, in answer, that the King had no right by proclamation to override the existing law nor to create any new offence. But the abuse was never really ended until the abolition of the extraordinary tribunals, such as the Star Chamber, in 1641.

The later Stuarts, though barred by the action of the Long Parliament from recourse to *Proclamations*, negatively infringed the legislative rights of Parliament by the exercise of the dispensing and suspending power. By 'suspending' the operation of statutes, as by the *Declarations of Indulgence* in 1686 and 1687, or even by 'dispensing' with it in the case of individuals, such as Sir Edward Hales in 1686, the legislative will of Parliament was rendered of no effect. The Bill of Rights put a final stop to the practice by declaring—

(1) That the pretended power of suspending of laws or the execution of laws by regal authority, without consent of Parliament, is illegal.

(2) That the pretended power of dispensing with laws or

the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal.

Not less sharp was the conflict between the Stuarts and the House of Commons in regard to parliamentary privileges. The right to determine all questions affecting elections to their own House; to secure their members from arrest (Shirley's case, 1604); to punish their own members by expulsion (Floyde's case, 1621), and, above all, freely to debate all matters of public interest, all provided questions of dispute between James I and the House of Commons. Even more serious was the attempt of Charles I to deny the right of Parliament to call ministers to account, in order to shield his favourite, Buckingham.

But all these questions are only specific illustrations of a more general difficulty. Not yet had it been definitely decided where sovereignty resided: whether in the Crown or in the Crown-in-Parliament.

That problem—the ultimate and supreme problem in Political Science—was practically solved by the Revolution of 1688.

CHAPTER X

THE LEGISLATURE: (5) THE HOUSE OF COMMONS SINCE THE REVOLUTION

'In outer seeming the Revolution of 1688 had only transferred the sovereignty over England from James II to William and Mary. In actual fact it had given a powerful and decisive impulse to the great constitutional process which was transferring the sovereignty from the King to the House of Commons. From the moment when its sole right to tax the nation was established by the Bill of Rights, and when its own resolve settled the practice of granting none but annual supplies to the Crown, the House of Commons became the supreme power in the State . . . . but while freeing itself from the control of the Crown it was as yet only imperfectly responsible to the people.'—J. R. GREEN.

'It was a measure, at once bold, comprehensive, moderate, and constitutional. Popular, but not democratic: it extended liberty, without hazarding revolution . . . . Worthy of the struggles it occasioned,—it conferred immortal honour on the statesmen who had the wisdom to conceive it, and the courage to command its success.'—T. E. MAY on the *Reform Act of 1832*.

'Representative institutions will probably perish by ceasing to be representative . . . a tendency to democracy does not mean a tendency to parliamentary government, or even a tendency towards greater liberty.'—W. E. H. LECKY.

THE Revolution of 1688 marks the decisive epoch in the long-drawn contest between the Executive and the Legislature. The House of Commons, in particular, emerged from the welter of the seventeenth century if not actually supreme over all rival bodies in the Constitution at any rate well on the way towards final victory.

Its supremacy was definitely established in the course of the period upon which we now enter, and was due, as we have already seen in another connexion, to several con-

current causes. A standing army, despite the deep-seated suspicion of a people who had groaned under the military despotism of Cromwell, became, after the Revolution, a permanent feature of the polity. The more continuous intervention in Continental politics into which England was drawn by the accession of the Dutch Stadtholder and the extension of her colonial responsibilities, contributed, with other reasons, to this important change. But the people never ceased to mistrust it; the House of Commons refused to provide for the discipline of the Army for more than twelve months ahead—a precaution which necessitated the annual meeting of Parliament. In this curiously but characteristically indirect manner, a Constitutional change of the first importance was accomplished. Nothing has done more to secure the supremacy of the Legislature than its regular annual assembling.

The change in the mode of granting supplies to the Crown; the discrimination between national and royal expenditure, and the institution of the *Civil List* gave to the House of Commons, for the first time, complete control not only over the raising of the revenue, but also over its expenditure. The gradual organization of political parties, and the evolution of the Cabinet system also contributed powerfully to the practical ascendancy of the House of Commons in English politics.

But this ascendancy brought with it temptations which the Commons, during a great part of the eighteenth century, showed no disposition to resist. Between 1688 and 1832 they were in a peculiar position. Victorious in their contest with the Crown, they had not yet felt the sense of responsibility to the people. It is not, therefore, remarkable that they should have developed and displayed an overbearing temper which brought them into conflict first with the House of Lords, and, later, with the people.

Their conflict with the Lords touched three important

points: the judicial functions of the Upper House;[1] the rights of the Commons in regard to Money Bills, and the co-ordinate rights of the Second Chamber in regard to general legislation, rights which were threatened by the invention of a Parliamentary device known as 'tacking'.

The question as to the jurisdiction of the House of Lords, whether as a court of first instance or a court of appeal, has been already dealt with. That of the right of the Commons as to Money Bills was expressly reserved, and must now engage our attention.

So far back as 1407 the Commons preferred the definite claim that all grants of Supply to the Crown must originate in the Lower House. In view of the fact that they represented those who were least able to pay the claim was not, *per se*, unreasonable, and, apparently, was not contested. For two centuries and a half no further question appears to have arisen as to finance between the two Houses. Both were too busily occupied in asserting their position against the Crown to have leisure for domestic quarrels.

But after the Restoration the position was altered. The contest with the Crown was nearly closed, and at the same time the national finances were placed upon a new basis by the virtual extinction of the theory of *Estates*. The Estate of the clergy, as we have seen, surrendered their privilege of separate class taxation in Convocation in 1663, and almost at the same moment the feudal land-owners merged, in a fiscal sense, into the mass of the nation. Feudal tenure by military service was abolished by the Protectorate Parliament in 1656, and though momentarily revived at the Restoration it was finally swept away by Statute in 1661. Thus barons and clergy alike fall completely into the national system; henceforward there is no fiscal distinction between classes whether of privilege or obligation; all are equal before the law.

[1] *Supra*, c. vii.

This is the moment chosen by the Commons, and not unnaturally chosen, for the reassertion of their claims to exclusive, or at least pre-eminent, control over taxation. The whole burden of maintaining the national Services both in peace and war now fell—apart from the 'hereditary' revenues of the Crown—as a common charge upon the nation at large. It was natural that the Commons should regard with jealousy and suspicion any attempt to tax the people whom they represented. A pretext for a quarrel soon arose. In 1661 the Lords passed and sent down to the Commons a Bill for 'paving, repairing, and cleansing the streets and highways of Westminster'. The Commons, in high dudgeon, rejected the Bill, on the ground that 'it went to lay a charge upon the people', and 'that no Bill ought to begin in the Lords' House which lays any charge or tax upon any of the Commons'. To this assertion the Lords demurred as being 'against the inherent Privileges of the House of Peers, as by several Precedents wherein Bills have begun in the Lords' House, *videlicet* 5to Elisabethae a Bill for the Poor, and 31 Eliz. for Repair of Dover Haven, and divers other Acts, does appear'. The Commons thereupon passed a Bill of their own and sent it up to the Lords. This time it was for the Lords to protest; but in the event

'the Lords, out of their tender and dutiful Respects to His Majesty, who is much incommodated by the Neglect of those Highways and Sewers mentioned in the Bill, have for this time in that respect alone, given way to the Bill now in Agitation, which came from the House of Commons, with a Proviso of their Lordships: *videlicet*, "Provided always that nothing in the passing of this Bill, nor any thing therein contained, shall extend to the Prejudice of the Privileges of both or either of the Houses of Parliament, or any of them; but that all the Privileges of the said Houses, or either of them, shall be and remain, and be construed to be and remain, as they were before the passing of this Act, any thing therein contained to the contrary notwithstanding;

with this Protestation that this Act shall not be drawn into Example to their Prejudice for the future."'[1]

The Commons refused to accept the Bill with the insertion of this proviso; matters came to a deadlock, and the proposed legislation had to be abandoned

A similar Bill of a more general nature was, however, passed in the following year; a similar impasse was threatened, but on this occasion the Lords, after formal protest from several of their number, gave way.[2]

But this was only the beginning. In 1671, and again in 1675, the Lords attempted to amend Bills of Supply sent up to them by the House of Commons, proceedings which evoked two famous resolutions. By that of 1671 the Commons affirmed that 'in all aids given to the King by the Commons the rate or tax ought not to be altered by the Lords';[3] by that of 1678,

> 'That all aids and supplies, and aids to His Majesty in Parliament are the sole gift of the Commons; and that all Bills for the granting of any such aids or supplies ought to begin with the Commons; and that it is the undoubted and sole right of the Commons to direct, limit, and appoint, in such Bills, the ends, purposes, considerations, conditions, limitations, and qualifications of such Grants, which ought not to be changed or altered by the House of Lords.'[4]

The importance of these resolutions can scarcely be exaggerated. On both occasions the Lords in the end gave way, but not without the following emphatic protest:

> 'Resolved, *Nemine contradicente*, that the Power exercised by the House of Peers, in making the Amendments and Abatements in the Bill, intituled, "An Act for an additional Imposition on several Foreign Commodities, and for the Encouragement of several Commodities and Manufactures of this Kingdom", both as to the Matter, Measure, and

[1] *L. J.*, xi. 328 a.
[2] *L. J.* xi. 467-9.
[3] *C. J.* ix. 235.
[4] *C. J.* ix. 509.

Time, concerning the Rates and Impositions on Merchandize, is a fundamental, inherent, and undoubted right of the House of Peers, from which they cannot depart.'[1]

What then is the general principle affirmed in these historic resolutions? It will be observed that the Lords' right of concurrence in taxation was not questioned.

They cannot legally *impose* a charge upon the people; hence they cannot 'alter or amend' a tax proposed by the Commons, but they may refuse to concur in its imposition and, therefore, may reject it. In course of time, however, and partly, perhaps, in consequence of the ambiguity of the wording of the resolution of July 3, 1678, confusion has arisen between a tax or grant, and the aggregation of taxes contained in a modern Finance Bill, and it is now common to contend that the Lords have lost (if they ever possessed) the right to amend not only a particular tax, but the general scheme of taxation as embodied in a Money Bill.

This confusion, and the difficulties arising therefrom, have unquestionably been greatly enhanced by the device adopted by Mr. Gladstone in 1861. In 1860 a Bill for repealing the duty on paper formed part of the financial proposals of the year. The anticipated loss of revenue from this and other duties was to be met by an increase in the Income Tax from ninepence to tenpence in the pound. The Income Tax Bill passed both Houses; the Paper Duty Repeal Bill, after narrowly escaping defeat in the Commons, was rejected by the Lords. To no one did the action of the Lords give greater satisfaction than to Lord Palmerston, then Prime Minister. He had already expressed his private opinion to the Sovereign that if the Lords rejected the Bill they would 'perform a good public service' and that 'the Government might well submit to so welcome a defeat'. But the Premier reckoned without the Chancellor of the

[1] *L. J.* xii. 498 b.

Exchequer. Mr. Gladstone took a high line in regard to the action of the Lords, and Lord Palmerston was compelled with very ill grace to submit to the House of Commons a series of resolutions reasserting in the strongest terms the privileges of the Commons in regard to taxation. The first affirmed that 'the right of granting aids and supplies to the Crown is in the Commons alone, as an essential part of their constitution, and the limitation of all such grants as to matter, manner, measure, and time is only in them'. The second, while admitting that the Lords had sometimes 'exercised the power of rejecting Bills relating to taxation by negativing the whole', 'nevertheless affirmed that the exercise of that power hath not been frequent and is justly regarded by this House with peculiar jealousy as affecting the right of the Commons alone to grant supplies and to provide the ways and means for the service of the year.' The third, grimly foreshadowing future action, stated 'that to guard for the future against an undue exercise of that power by the Lords, and to secure to the Commons their rightful control over taxation and supply, this House has in its own hands the power so to impose and remit taxes and to frame Bills of Supply that the right of the Commons as to the matter, manner, measure, and time may be maintained inviolate'. In regard to the rejected Bill itself one point demands notice: the Lords had already concurred with the Commons in providing the necessary supplies for the year. By rejecting the Paper Duty Repeal Bill they did, in effect, impose a charge upon the people which the Commons had declared to be uncalled for.

But in the following session Mr. Gladstone's time came. The veiled threat was translated into action. The Chancellor of the Exchequer not only showed his teeth, but proceeded to bite. He embodied all the financial proposals of the year, including the rejected Paper Duty Repeal Bill, in a single omnibus Bill, and challenged the House of Lords to

accept or reject it as a whole. It was a bold challenge. But it was justified by success, and it has set a precedent from which there has been no departure from that day to this. Mr. Gladstone's distinguished biographer does not exaggerate its significance when he writes :—

'The abiding feature of constitutional interest in the Budget of 1861 was this inclusion of the various financial proposals in a single bill, so that the Lords must either accept the whole of them or try the impossible performance of rejecting the whole of them. This was the affirmation in practical shape of the resolution in the House of Commons in the previous year. . . . Until now the practice had been to make the different taxes the subject of as many bills, thus placing it in the power of the Lords to reject a given tax bill without throwing the financial machinery wholly out of gear. By including all the taxes in a single Finance Bill the power of the Lords to override the other House was effectually arrested.'[1]

Whether this is to be regarded as the last word in the matter of the rights of Lords and Commons respectively in Finance is a question rather for the politician than the historian. The latter may be content with recording the fact that between 1861 and 1909 the Lords were at once careful to reserve their rights and not to exercise them. In 1909, however, they rejected the Finance Bill of the year and compelled the Government of the day to submit their financial policy to the judgement of the electorate. Unfortunately, however, the verdict returned was too ambiguous to permit any positive deduction to be drawn from it.

We must retrace our steps to the Revolution of 1688. Not only in regard to Finance Bills were the Commons anxious to restrict the independence of the Upper House. Flushed by the victories won in 1671 and 1675 the Commons attempted in 1692, and again in 1700, to abrogate the co-ordinate authority of the Lords in the matter of ordinary

[1] Morley, *Life of Gladstone*, ii. 40.

legislation. This end was to be achieved by the device which came to be known as *tacking*: an ordinary Bill was tacked on to a Bill of Supply, and the Lords were dared to reject the composite measure.

Such tactics were bitterly and naturally resented by the Peers, whose case is admirably put in a notable passage by Macaulay :—

'Not only are we to be deprived of that co-ordinate legislative power to which we are, by the constitution of the realm, entitled. We are not to be allowed even a suspensive veto. We are not to dare to remonstrate, to suggest an amendment, to offer a reason, to ask for an explanation. Whenever the other House has passed a bill to which it is known that we have strong objections, that bill is to be tacked to a bill of supply. If we alter it, we are told that we are attacking the most sacred privilege of the representatives of the people, and that we must either take the whole or reject the whole. If we reject the whole, public credit is shaken; the Royal Exchange is in confusion; the Bank stops payment; the army is disbanded; the fleet is in mutiny; the island is left, without one regiment, without one frigate, at the mercy of every enemy. The danger of throwing out a bill of supply is doubtless great. Yet it may on the whole be better that we should face that danger, once for all, than that we should consent to be, what we are fast becoming, a body of no more importance than the Convocation.' [1]

Some hotheads in the Commons even went so far as to threaten to use the newly invented instrument for penal proceedings against political opponents: 'They object to tacking, do they? Let them take care that they do not provoke us to tack in earnest. How would they like to have bills of supply with bills of attainder tacked to them?' Macaulay justly describes this as an 'atrocious threat, worthy of the tribune of the French Convention in the worst days of the Jacobin tyranny.' [2] The overbearing insolence of the Lower House was becoming insupportable. Even the judicial

[1] *History of England*, iv. 328–9. [2] *op. cit.* iv. 330.

Hallam describes 'tacking' as a 'most reprehensible device', as tending 'to subvert the Constitution and annihilate the rights of a coequal House of Parliament'.[1] Macaulay is characteristically more emphatic:—

> 'In truth, the House [of Commons] was fast contracting the vices of a despot. It was proud of its antipathy to courtiers; and it was calling into existence a new set of courtiers who would flatter all its weaknesses, who would prophesy to it smooth things, and who would assuredly be in no respect less greedy, less faithless, or less abject than the sycophants who bow in the ante-chamber of kings.'[2]

It was indeed time that a determined stand should be made, in the interests of the nation at large, by the Chamber which was not technically 'representative'.

But here the Lords were confronted by a difficulty which is perpetually recurring. The particular occasion was not a favourable one. The 'tacked' Bill was one which intrinsically commended itself to the judgement of many of the Peers, and represented a cause likely to be popular—on the grounds of expediency—in the country. Entirely objectionable as was the method adopted by the Commons, the Peers judged, and rightly, that the ground selected for a battle-royal with the Commons must be in every respect favourable. 'The Lords,' as Macaulay wisely observes, 'must wait for some occasion on which their privileges would be bound up with the privileges of all Englishmen, for some occasion on which the constituent bodies would, if an appeal were made to them, disavow the acts of the representative body; and this was not such an occasion.'[3] Unsteady and captious as is his judgement on men, in his judgements on political issues Macaulay is rarely at fault. The wisest of the Peers were in favour of surrender. The tacked Bill was accepted, but two years later (December 9, 1702) the Lords placed it formally on record: 'That the

[1] *Constitutional History*, iii. 142.
[2] *op. cit.* iv. 326.
[3] ibid. iv. 331.

annexing any clause or clauses to a Bill of aid or supply the matter of which is foreign to and different from the said Bill of aid or supply is unparliamentary, and tends to destruction of the constitution of the Government.'

This resolution may be accepted as the last word on the subject. By all parties 'tacking' is justly repudiated as tactically unfair and constitutionally untenable; and it is noticeable that in the Constitutions recently drafted for the Commonwealth of Australia and for United South Africa special precaution is taken against the introduction of such a practice into the legislatures of those countries. Thus, Section 55 of the Australian Commonwealth Act provides that 'Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect'. The South African Constitution of 1909 contains an almost identical provision. We may dismiss, therefore, as politically impossible the recrudescence of a device so unequivocally condemned by Constitutions which are held to embody the accumulated wisdom of the ages.

But the House of Commons, inflated by the events of the Restoration and the Revolution, was not content with manifesting a domineering temper towards the Lords. It was equally overbearing in its dealings with the people at large and even with the constituencies which it was supposed to represent. This is most clearly demonstrated by a reference to the history of parliamentary privilege in the eighteenth century.

Those privileges had been originally asserted to protect the liberties of the House of Commons as against the Crown. They were rightly regarded as essential to its independence, essential to the efficient performance of the task undertaken on behalf of the nation as a whole. They were now perverted to an entirely different purpose. No longer needed as a defence against the Crown, they were

utilized as ramparts against the intrusion of the people, and at times they were even employed as engines of oligarchical tyranny.

A few illustrations will suffice to make this point good. There was no privilege of the Commons more highly cherished or more jealously maintained than that of freedom of speech. This privilege had been successfully vindicated so far back as the fourteenth century in the famous case of Sir Thomas Haxey (1397), and later in that of Strode (1513). Between Elizabeth and her Parliaments there was an exceptional amount of friction on this point. Friction developed into actual collision in the next reign, and the quarrel reached its culminating point when, in 1621, James I angrily tore out of the records of Parliament the protest entered against his denial of this cherished privilege. Not, however, until 1689 was the final victory achieved, when the Bill of Rights declared (§ 9) that 'the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'.

How was this privilege perverted to the detriment of the people? To the complete enjoyment of freedom of speech in Parliament there was one essential—secrecy. There could be no real freedom of debate if words spoken in the House were reported to the Crown. The Long Parliament permitted the authorized publication of debates, and in 1680 the votes and proceedings of the House of Commons were ordered to be printed under the direction of the Speaker. But after the Revolution the House made frequent attempts to prevent the publication of debates, though with ever-decreasing success. The middle classes were beginning to manifest a new interest in the doings of the House of Commons; imperfect information only stimulated curiosity; garbled and inaccurate reports obtained a wide circulation, until at last, in 1771, matters reached a crisis. Colonel Onslow raised as a question of privilege the inaccurate reports of

Parliamentary debates. Six printers were summoned to the bar of the House; two of them, Wheble and Thompson, were collusively arrested in the City and discharged by the aldermen before whom they were brought. One of the aldermen was the notorious Wilkes, who was the prime instigator of the contest. A third printer, Miller, gave the messenger of the House who attempted to arrest him into custody, and the latter was committed by the City magistrates for attempting to execute in the City a warrant which was not backed by a City magistrate. The issues now became increasingly complicated, but the final result was essentially a victory for Wilkes; the publication of debates was henceforward tacitly allowed, and was ultimately surrounded with special privileges.[1] Still further publicity has been given to proceedings in Parliament by the publication of Division Lists. Those of the Commons have been regularly published since 1836; of the Lords since 1857. The presence of strangers in the galleries of the House—regarded at one time with extreme jealousy, and still technically a breach of privilege—has been generally accepted and recognized.

Another privilege perverted by the Commons to oligarchical ends in the eighteenth century was that of determining all questions affecting the constitution of their own House, including the question of disputed elections. This brought the two Houses into conflict in 1702 in the famous case of Ashby *v.* White. But much more important was the quarrel between the House and the Electors of Middlesex over the worthless but by no means prostrate body of John Wilkes. Wilkes, expelled from the House for seditious libel, was re-elected in 1769; was again expelled and declared incapable of re-election; was a third time elected, when his seat was given by decision of the House to his defeated opponent, Colonel Luttrell. This was an act of high-handed

[1] Cp. cases of Stockdale *v.* Hansard (1836) and Wason *v.* Walter (1868).

tyranny which evoked the strong condemnation of Burke. Worthless as Wilkes might be, there was, as Burke clearly perceived, a principle at stake which went far deeper than the merits or demerits of an individual. If the House of Commons were to be permitted to dictate to a constituency the choice of its representatives, the principle of co-option would be substituted for that of election. Here, as in the affair of the printers, Wilkes ultimately triumphed, and in 1782 all the records of the proceedings were expunged from the journals of the House.

Not remotely connected with the last case is the right claimed by the Commons to punish both its own members and outsiders for contempt of its orders and breach of its privileges. Essential to its dignity, if not its independence, it is easy to see how such a privilege might be abused by an assembly which was infused with oligarchical principles; and there are plenty of instances to prove that in the eighteenth century the danger was neither remote nor illusory. They need not, however, detain us. Enough has been said to prove that the House of Commons was in the eighteenth century far from being in that close touch with the constituencies, far from exhibiting that quick responsiveness to the sentiments of the electorate which have been so marked since the removal of all restrictions in the publicity of Parliamentary proceedings, and since the wholesale re-adjustment of electoral areas and qualifications involved in the Reform Acts of the nineteenth century.

The last point brings us naturally to a consideration of the composition of the House of Commons during this period. That composition has been profoundly modified, first, by the expansion of England into the United Kingdom; and, secondly, by the Reform legislation of the nineteenth century. These two causes now demand attention.

The Act for the legislative union of England and Scotland

(1707) brought into the House of Commons forty-five additional members, thirty of whom represented counties, and fifteen borough constituencies. Nothing, however, was done to amend the anomalies either of the electoral franchise or the electoral areas. The Irish Union (1801) added one hundred members, of whom sixty-four represented counties, thirty-five boroughs, and one the University of Dublin (Trinity College). These additions raised the total numbers of the House from 513 to 658, a figure which remained constant until after the Reform Acts of 1884–5.

To the question of Parliamentary Reform we now turn. The Acts affecting the House of Commons were, in the earlier part of the eighteenth century, predominantly oligarchical in tendency. Thus, in 1710 it was provided that county members must possess landed property worth £600, and borough members worth £300 a year. Both qualifications were systematically evaded, but were not abolished until 1858. The Septennial Act of 1716, with which we have already dealt in another connexion, tended to render the House more independent of the constituencies, while the Acts for the exclusion of placemen and pensioners (1705) and Government Contractors (1782) were similarly intended to render it more independent of the Crown. Wholly different was the spirit which animated the movement for Parliamentary Reform.

That movement derived its impulse from three widely differing quarters: first, from the politico-psychological idea that the electoral franchise was a 'right', deprived of which the citizen was something less than free; secondly, from the economic revolution which changed the face both of rural and urban England in the last decades of the eighteenth century; and, thirdly, from the anomalies, becoming each year more grotesque, of the existing electoral system.

The last consideration operated most powerfully in England. Not since the middle of the fifteenth century

had there been any general enactment in regard to the franchise, and the change then effected had been of a reactionary character. Since the Revolution of 1688 there had been no change in the distribution of seats. But in the course of the eighteenth century a new England came into being. Population, which had been thin and scattered, not only increased with unprecedented rapidity, but shifted in distribution. The 5,000,000[1] people of 1700 more than doubled in the succeeding century and a quarter.

Towns which in Tudor and Stuart times had been important centres of trade were decaying into hamlets; villages were growing into cities. The counties north of the Trent, which down to the eighteenth century were largely in a state of barbarism, were becoming the centres of industrial activity. Bradford-on-Avon was yielding pride of place in the woollen trade to Bradford-on-Aire. Manchester and Liverpool, Leeds and Birmingham were attaining to the pre-eminence which they have never since lost.

But electoral changes had not kept pace with economic development. Of the 203 Parliamentary boroughs in 1831 no fewer than 115 were contained in the ten maritime counties between the Wash and the Severn and the county of Wilts; and of the 115 no less than 56 were on the tide-way.[2] But this distribution, as Mr. Porritt points out, presents no paradox when the 'social and industrial conditions of England up to the reign of Elizabeth are borne in mind'.[3] Any anomalies which had arisen were of comparatively recent origin. But they were sufficiently glaring. Such places as Old Sarum, Newtown (Isle of Wight), Gatton, Bramber, Bossiney, Beeralston, Hedon, Brackley, and Tregony, some of them hardly distinguishable hamlets, returned two members apiece; Manchester, Birmingham, Leeds, Sheffield, Wolverhampton, Halifax, Bolton, and Bradford returned none.

[1] Estimates of population before 1801 are only rough.

[2] Porritt, *Unreformed House of Commons*, p. 90. [3] *op. cit.*, p. 85.

The vagaries of the electoral franchise were not less bewildering than those of the distribution of seats. The county members were elected on a uniform franchise by the 40*s.* freeholders; but in the boroughs the utmost variety prevailed. In some, known as 'Scot and Lot Boroughs', all ratepayers were entitled to vote; in others only the hereditary 'freemen'; in others only members of the municipal corporation; in others 'potwallopers; while in others the franchise was attached to the ownership or occupation of particular houses known as 'ancient tenements'. But it is noticeable that even in boroughs where the franchise was theoretically wide, it was in practice narrow and confined. Thus in Gatton, where it was enjoyed by all freeholders and 'Scot and Lot' inhabitants, there were only seven qualified to exercise it, and in Tavistock only ten.

It was the restriction of the franchise which threw such enormous power into the hands of the Government, of the great territorial magnates, and of the great 'Nabobs', and which contributed in large measure to the almost universal corruption prevailing in the borough constituencies. A vote was a possession far too valuable to be parted with except for a high consideration, and it has been estimated that prior to 1832 not more than one-third of the members of the House of Commons represented 'the free choice even of the limited bodies of electors then entrusted with the franchise'. In 1780 it was declared by the Duke of Richmond that six thousand electors returned a clear majority of the House of Commons. According to the detailed analysis of Oldfield no fewer than 487 out of the 658 members were virtually nominees.

Gross corruption, alike in the constituencies and among the elected or nominated representatives, was the inevitable corollary of such a system. To the sale and purchase of seats the term cannot in fairness be applied. A seat was

as much a marketable commodity in the eighteenth century as an advowson in the nineteenth, and the legitimacy of the transaction was recognized alike in Pitt's Reform Bill of 1785 and in the Act of Union of 1800. In each case the value of a seat was estimated at over £7,000. Nor was this excessive; for sums far in excess of this amount were frequently spent on a Parliamentary contest. Thus in 1768 the Bentincks and Lowthers spent £40,000 apiece in contesting the counties of Cumberland and Westmoreland; while at York in 1807 the joint expenses of Lord Milton and Mr. Lascelles are said to have amounted to the astounding sum of £200,000.

Various attempts were made to call attention to these anomalies and to find a remedy, but it took close on a century to arouse public opinion to the pitch of action. As far back as 1690 John Locke denounced the gross absurdities of a system under which 'the bare name of a town, of which there remains not so much as the ruins, where scarce so much housing as a sheepcote, or more inhabitants than a shepherd is to be found, send as many representatives to the grand assembly of lawmakers as a whole county numerous in people and powerful in riches'.[1]

In 1745 Sir Francis Dashwood moved an amendment to the Address claiming for the people the right to be freely and fairly represented in Parliament; but his protest made no impression. After the middle of the century, however, opinion began to ripen rapidly. The persistent attempt of the young king, George III, to rule in and through the House of Commons by systematic corruption opened men's eyes to the significance of the question; the long struggle with the American Colonies raised awkward questions as to the relation between representation and taxation; still more awkward questions were raised by the contest between the

[1] Locke, *Treatises of Government*, II, c. xiii, § 157.

House of Commons and the electors of Middlesex over the person of John Wilkes. Chatham proposed in 1766 to amend the anomalies of distribution by giving an additional member to each of the counties, and so counteract the influence of the 'rotten' boroughs. But the scheme was stillborn. Wilkes's attempt in 1776 was equally ineffective.

A distinct stage in the agitation was registered when in 1780 a *Society for Constitutional Information* was founded, under the patronage of Cartwright, Horne Tooke, and others. The formation of this society may be said to mark the birth of English Radicalism, and its programme anticipated by half a century the demands of the Chartists. It demanded annual Parliaments, universal suffrage, equal electoral districts, the abolition of the property qualification of Members of Parliament, payment of Members, vote by ballot. These points were embodied in a Bill introduced by the Duke of Richmond in 1780, but naturally found no acceptance. Five years later the younger Pitt introduced (1785) the first Ministerial Reform Bill. He proposed to buy out, at market price, thirty-six of the most rotten boroughs. The owners were to receive £7,000 per seat or £14,000 per borough, and the Members were to be transferred to the counties and to some of the largest towns. The principle on which it was based was perhaps a mischievous one, though it was sanctioned in the Irish Union; but the defeat of the Bill meant the postponement of Reform for nearly half a century. A second society—*The Friends of the People*—was formed in 1792 to promote the cause, and repeated Motions were made by Grey, Burdett, and others in Parliament. But the French Revolution and the Napoleonic Wars occupied the attention of the nation to the exclusion of all else for twenty-five years, and not until after the Peace of 1815 did interest in domestic questions revive.

It became clear that the years of repression had added vehemence to the agitation. There were now new forces behind it; among others, the political discontent of the new England—the England of the factory and the forge, the power loom and the steam engine—which had come into being during the last thirty years. From 1815 to 1830 the question was kept steadily to the front in the House of Commons; in 1830 the long Tory domination was broken, and a Whig Ministry under the veteran Lord Grey came into power pledged to a measure of Parliamentary Reform.

The Bill, which, after many vicissitudes and some amendments, passed into law in 1832, was unexpectedly comprehensive. It contained three parts: a large measure of disfranchisement, a corresponding measure of enfranchisement, and a simplification and extension of electoral qualifications. Fifty-five of the smallest boroughs returning two members each and one returning one were totally disfranchised; thirty boroughs lost a member apiece, and one lost two (out of four). Thus 143 seats were placed at the disposal of the Ministry. Twenty-two of the largest unrepresented boroughs received two members apiece, twenty-one others received one, sixty-five additional members were given to the English counties, eight to Scotland and five to Ireland. The total number of the House was, therefore, unaltered. In the boroughs the franchise was given to £10 householders, and in counties £10 copyholders and long leaseholders, and tenants-at-will rented at £50 a year were added to the 40*s.* freeholders. In all about 455,000 persons were enfranchised.

Lord John Russell, the real author of the Act, declared that it must be regarded as a final measure. That it was large in scope and wisely conceived is undeniable, but it entirely failed to satisfy the working-classes, whose agitation had supplied the fulcrum by which its passage had been secured. Its effect was, in truth, to make the middle classes politi-

cally supreme; the artisans and labourers were left out in the cold. They bitterly resented the exclusion, and their disappointment found vent in the Chartist movement of 1837–48. The fiscal reforms of Sir Robert Peel (1842–6) knocked the bottom out of the Chartist agitation for the time, but the turn of the artisans came before long. Between 1850 and 1866 a number of attempts were made, most of them by Lord John Russell himself, to carry another Reform Bill; but all, for various reasons, miscarried, and the next great measure placed upon the Statute-book was the result of Disraeli's dramatic 'leap in the dark' in 1867. That was the famous occasion on which the Tories 'caught the Whigs bathing and ran away with their clothes'.[1]

The Act of 1867 was, as regards the franchise, a bold and far-reaching measure. The redistribution effected was relatively insignificant. Eleven boroughs were totally and thirty-five were partially disfranchised. The fifty-two seats thus vacated were utilized to enfranchise twelve new boroughs, to give additional members to Manchester and seven other large towns, to subdivide Yorkshire and other populous counties, and to enfranchise London University and two new University constituencies in Scotland. The most interesting feature of this portion of the Bill was the short-lived experiment in 'minority' representation. In towns which received a third member, electors were allowed to give only two votes; the presupposition being that a minority would be able to secure the third seat. In Manchester it did; but in Birmingham, where the Liberal majority was both large and highly organized, it did not. As to the franchise, household suffrage with a £10 lodger franchise was established in the boroughs; in the counties a £12 occupation qualification was added to the existing ones. The general result was to enfranchise

[1] A phrase originally used by Disraeli in regard to Peel and now appropriately turned against himself.

about 1,080,000 citizens, of whom the vast majority were town artisans and labourers. The country labourer was still excluded. His turn came, however, in 1884, when Gladstone carried a Franchise Act, followed by a Redistribution of Seats Act in 1885.

The former, by assimilating the county to the borough franchise, added some 2,000,000 voters to the electoral register; the latter went near to establishing the principle of equal electoral districts. Except for twenty-two towns, which retain two members apiece, and certain Universities, the whole of the rest of the country, counties and boroughs alike, was divided up into single-member constituencies. In order to effect this, twelve additional members were added to the House, bringing up the total to 670.

By the Acts of 1832, 1867, 1884, and 1885 the House of Commons has been completely transformed, and the centre of political gravity has indubitably been shifted from the few to the many; the principle of democracy has been substituted for that of aristocracy.

Some are inclined to ask: Is it well? More evade the question by answering: It is inevitable. Few retain the illusion, once common, that the mere extension of the electoral franchise—the advent of political democracy—is in itself a panacea for all the ills to which modern society is heir. It is now generally perceived that democracy is not an end, but one of several possible means for the attainment of sound administration and social contentment. It can, however, hardly be doubted that successive doses of political reform averted in England the revolutions to which many of our neighbours were, during the same period, subjected. 'France,' said Napoleon III, 'knows how to make revolutions, but not how to make reforms.' England flatters herself that she knows how to avert revolution by timely reform. 'Those,' said Canning, 'who oppose improvement because it is innovation may one

day have to submit to innovation which is not improvement.' Englishmen have never questioned the soundness of this aphorism. But at the conclusion of a prolonged survey of political evolution one or two reflections obtrude themselves. Designed to secure the representation of the people as a whole, the existing machinery is in parts clumsy and in others inadequate. The Act of 1885 went a long way towards admitting the principle of equal electoral districts, but the principle is most inadequately realized in practice. If the numerical basis be accepted as sound, it must be admitted that there is grotesque over-representation in some parts (notably in Ireland), equally grotesque under-representation in others. Ireland has one member for every 44,147 of the population; England has only one for every 66,971. In the city of Durham there is one member to 14,935 inhabitants; in Walthamstow one to 217,030.[1] The value of a vote, therefore, varies enormously in different districts. Again, the system of single-member constituencies has notoriously failed in one of its main objects—to secure the adequate representation of minorities. A very large majority of members may be (and often is) returned by a minute majority of electors. Such a result is inconsistent with any sane theory of democracy. As Mill said: 'In a really equal democracy every or any section would be represented, not disproportionately, but proportionately. A majority of the electors would always have a majority of the representatives, but a minority of the electors would have a minority of the representatives. Man for man, they would be as fully represented as the majority. Unless they are, there is not equal government, but government of inequality and privilege.'

No one who desires to base politics on reason, to think out for himself the philosophical foundations upon which political institutions rest, can neglect such a warning from

[1] Lowell, i. 201.

such a source. It points clearly to a defect in the actual working of institutions based upon the acceptance of democratic theory.

Again, it is undeniable that the system of single-member constituencies has tended to intensify rather than to mitigate the excessive rigidity of Party organization, and has rendered it increasingly difficult for men who are in the least degree independent to secure election to the House of Commons. As a means of correcting these imperfections not a few thoughtful persons advocate a system of 'proportional representation' based upon the principle of the single transferable vote. But the detailed discussion of such schemes is beyond the scope of this work.

There is, however, one point to which, since it goes to the root of the whole matter under discussion, brief reference must be made. Is there any ground for the suggestion that the principle of representative government shows signs of weakening, and is indeed doomed to speedy annihilation? 'Representative institutions', said Mr. Lecky, 'will probably perish by ceasing to be representative.' The prediction may be deemed unduly pessimistic, but the warning of the most philosophical historian of our day should not pass unheeded. Can any reason be alleged for the suggestion? Democracy, as we have already seen, is not necessarily 'representative'. On the contrary 'representative' institutions are a relatively modern device adopted to meet certain peculiar, perhaps transitory, conditions. Are those conditions already ceasing to operate? It cannot be denied that there is some tendency to substitute the idea of delegation for that of representation. The quickening interest in political questions; the wider diffusion of education; the growth of the principle of association; the increasing tendency to government by discussion;—all these things are calculated to make the intellectual gulf between the average Member of Parliament and the average constituent

less and less wide. The adoption of the principle of class-representation and of payment of members tends obviously in the same direction. The extraordinary development of a cheap Press; the rapid diffusion of political news; the multiplication of means of communication and locomotion, are other factors in the problem of which it is necessary to take account. The sense of distance is almost annihilated. A Bengal Baboo may read a telegraphic summary of a speech in the House of Commons within a few hours of its delivery. The terms of a Viceroy's *Minute* may be canvassed in every working-men's club in Lancashire as soon as its contents are known to the natives of India. These are obvious and commonplace reflections, but they have a real bearing on the question of 'representative' democracy. It is no exaggeration to say that there is not a working-man in England to-day who is not in as good a position to discuss high questions of State-policy as was the average member of a Stuart Parliament. Whether he is as well equipped for the discussion may be disputable; the only point on which I insist is, that he has more command of the materials on which a judgement may be formed. James I rated the House of Commons for presuming to discuss questions of high policy on which they were incompetent to form a judgement. James's admonition had this much of justification: the Commons had no precise information. The presentation of 'Papers', the interrogation of Ministers, are modern developments of Parliamentary Government. But to-day the average member of the House is at no real advantage as compared with the humblest of his constituents. Given equal intelligence, the latter has equal materials for the formation of a political judgement. He may indeed lack experience of administration; but so may his representative. The men who have the widest knowledge of affairs are generally to be found in the non-elected Chamber. Moreover, in proportion as discussion of general

policy has been curtailed in Parliament, it has been transferred to the platform and the Press. The most concentrated and effective argument even of Members of Parliament is frequently reserved for a letter to the *Times*, or an article in a monthly Review. To say that this threatens the existence of representative institutions may savour of exaggeration; but it does suggest considerations of which the student of political development must take account.

And there is another. No close observer of English politics can doubt that the doctrine of the 'mandate' is gaining ground. Both political Parties—especially when in opposition—increasingly insist upon it. But what does this imply but a weakening of the 'representative' character of Parliament? No measure is to be passed into law unless it has behind it the direct *mandate* of the constituencies. Such is, in effect, the argument. But there is infinite dispute as to whether such a mandate has or has not in any given case been issued by the electorate. A 'Khaki' House of Commons was said to have no mandate to pass an Education Bill. A House elected on the issue of Free Trade *v.* Protection must not grant Home Rule to Ireland—and so forth. The argument is becoming increasingly familiar; if pushed to a logical conclusion it can have but one issue—the adoption of some species of '*Referendum*'.

A Referendum is the negation of the principle of representative, the assertion of that of direct Democracy. It has many forms, but in essence it is a method for directly ascertaining the will of the electorate on a particular issue. The extension of the principle in Switzerland has given to the electors not merely the right of veto, but the immensely more important function of legislative initiative. The people have not merely the right of saying 'yes' or 'no' to projects of law submitted to them by the Legislature, but actually to submit projects of law to the Legislature.

The *Referendum* is favoured by many persons in this

country, primarily as a method of terminating constitutional deadlocks, of deciding questions in dispute between the two Chambers of the Legislature. From that point of view it has much to recommend it; but it is not an expedient to be lightly adopted, nor without adequate recognition of its ultimate possibilities. It is quite unmistakably a step towards direct Democracy in contradistinction to representative government. As such it may be welcomed or mistrusted; but advocates and opponents should alike attempt to realize the tremendous consequences which its adoption might involve.

CHAPTER XI

THE PROCESS OF LEGISLATION: PARLIAMENTARY PROCEDURE

'The main problems of Parliamentary procedure under existing conditions are two: on the one hand, how to find time within limited Parliamentary hours for disposing of the growing mass of business which devolves on the Government, and on the other hand, how to reconcile the legitimate demands of the Government with the legitimate rights of the minority—the dispatch of business with the duties of Parliament as the great inquest of the nation at which all public questions of real importance find opportunity for adequate discussion.'—Sir C. P. ILBERT, Clerk of the House of Commons.

THE preceding chapters have dealt with the structure of Parliament, with the changes in its composition, and the evolution of its functions. Of these the most characteristic, perhaps the most important, is the making of laws; and it may, therefore, be desirable to add some account of the process by which this is accomplished, and to describe the course of business in Parliament.

On the meeting of a new Parliament, the first business of the House of Commons is the election of a Speaker. The Speaker, whose office dates from the fourteenth century, has always been nominated by the Commons and approved by the Crown. Originally the medium of communication between the King and the Commons, he is still the principal officer of the House, the regulator of its procedure, the jealous guardian of its dignity, the president over its debates. When the House goes into Committee his functions as President devolve upon a Deputy—known as the Chairman of Committees—whose authority is hardly less absolute, though his dignity is markedly inferior.

The work of the House resolves itself into three main parts: (1) Deliberation: the discussion of matters of public

importance; (2) Critical: the imposition of a check upon the Executive Government, by interpellation and criticism; and (3) Legislation: the making of new and the amending of existing statutes.

The last may be regarded as the main business of Parliament, and with it this chapter will be primarily concerned. As a matter of fact, the performance of the deliberative and critical functions (apart from the regular interpellation of Ministers) is largely incidental to financial legislation.

The Legislative work of Parliament is threefold: (1) Ordinary Legislation or Public Bills; (2) Financial Bills; (3) Private Bills; Bills affecting particular localities or interests.

Any member may, if he gets the chance, initiate legislation. Every Session a large number of Bills are introduced by 'private' members, i. e. by members who hold no ministerial office. It is increasingly rare for Bills thus initiated to come to legislative fruition, but the discussion of such projects is far from being invariably wasted. Occasionally the Government adopts as its own the project formulated by a private member; sometimes it grants him exceptional facilities for passing it into law; still more often a private member's Bill stifled in infancy in one Session, perhaps in many Sessions, ultimately finds an honoured place in the Ministerial programme. It would probably be within the mark to say, that of the important legislative enactments of the nineteenth century half made their début in the House of Commons under the aegis of a private member. But the tendency is for the Government more and more to absorb the time of the House and to demand priority for their own legislative proposals. With the increasing complexity of public business, the ever-widening responsibilities of the House of Commons, and the growing demand for legislation on every conceivable topic, this tendency is irresistible; but no one can doubt that the extinction of the legislative activity of the private member would

result in a deterioration in the quality, if not the quantity, of Parliamentary enactments. People who hold that the efficiency of the Parliamentary machine is to be judged by the number of 'first-class' measures placed upon the statute-book are naturally impatient of the 'waste of time' involved in the discussion of projects which can rarely hope to ripen into immediate fruition. But I suggest that this view is in reality short-sighted and erroneous. Of a given Session or even a given Parliament it may be true; the chance of the ballot may operate in favour of the impracticable crank; but a longer view reveals the fact that much of the best legislative work of successive Parliaments had its origin in the 'fads' of private members. From the earlier Factory Acts down to Imperial Penny Postage the annals of Parliament teem with illustrations of this truth.

As regards procedure there is no distinction between a Government Bill and a *Private Member's Bill.* But sharply to be distinguished from both are *Private Bills*, and to avoid confusion it may be well to deal with the latter before analysing procedure on the former.

A Private Bill is one which is promoted in the interest of some particular locality, persons, or collection of persons. Bills to permit the construction of railways, harbours, tramways, for drainage schemes or the supply of water, gas, or electricity, afford the commonest illustrations. Such Bills originate in Petitions, which must be sent in before a given date (about two months before the commencement of a normal Session), and are then submitted to a quasi-judicial examination at the hands of officials of the House known as Examiners of Petitions for Private Bills. These examiners report that the very stringent regulations applicable to such Bills have or have not been complied with. If everything is in order[1] the Bill is introduced into one

[1] The House has power to condone the omission to comply with Standing Orders if it sees fit.

or other House—Private Bills being distributed, to facilitate business, fairly evenly between the Houses. The 'presentation' of a Private Bill is equivalent to the first reading of a Public Bill. On second reading a debate on the general principle may take place. If the Bill survives second reading it is referred to a Private Bill Committee, consisting of four members and a referee not interested in the Bill. The Committee stage of a Private Bill is in reality a judicial proceeding conducted with the aid of Counsel and sworn witnesses. If the preamble of the Bill is 'proved', the Committee proceeds to examine its clauses in detail, and these having been approved, the Bill is reported to the House, and goes on its further way like an ordinary Public Bill. It should be added that the expense of obtaining a Private Bill is heavy, and that the Exchequer makes a considerable profit out of the fees charged in connexion therewith.

Partly to avoid this expense, and partly to secure the goodwill of the Department concerned—generally the Local Government Board or the Board of Trade—it has become increasingly common for the promoters of the various undertakings which require Parliamentary sanction to proceed by means of *Provisional Order*. A *Provisional Order* is, in effect, an Order issued in pursuance of a statute after searching investigation by a Government Department. These Orders have to be sanctioned by Parliament, before which they are formally laid by the Department which issues them; but they are rarely opposed and still more rarely rejected. Mr. Lowell states that of the 2,520 Provisional Orders issued by the Local Government Board from 1872 to 1902 only twenty-three were rejected by Parliament. This is at once a proof of the confidence reposed by Parliament in the great administrative departments and also an illustration of the increasingly marked tendency to legislate by delegation.[1] The whole machinery of Private

[1] Lowell, *Government of England*, i. 386.

Bill legislation has been subject to much criticism. That it is both clumsy and expensive is undeniable, but on the other hand it has earned the warm encomium of a publicist who is at once exceptionally impartial and exceptionally well informed. 'The curse of most representative bodies at the present day', writes Mr. Lowell, 'is the tendency of the members to urge the interests of their localities or their constituents. It is this more than anything else which has brought legislatures into discredit and has made them appear to be concerned with a tangled skein of private interests rather than with the public welfare . . . Now the very essence of the English system lies in the fact that it tends to remove private and local Bills from the general field of political discussion and thus helps to rivet the attention of Parliament upon public matters. A Ministry stands or falls upon its general legislative and administrative record, and not because it has offended one member by opposing the demands of a powerful company and another by ignoring the desires of a borough council. Such a condition would not be possible unless Parliament was willing to leave private legislation, in the main, to small impartial Committees and abide by their judgement.'[1]

We may now pass on to explain the procedure of Parliament in the case of Public Bills. These may again be subdivided into (1) ordinary legislation ; and (2) Bills of Supply.

Generally speaking, every Public Bill, whether originating in the Upper or Lower House, must in each House pass through five stages: first reading, second reading, Committee, Report, and third reading.

Except in Bills of first-rate importance, the first stage is as a rule purely formal and in certain cases it is omitted altogether. A member, official or private, moves for leave to bring in a Bill; leave is given, and the Bill is then brought in and printed. The real debate on the principle

[1] *op. cit.* i. 391–2.

of the measure takes place on the motion for the second reading. On a measure of the first magnitude, such as the Home Rule Bills of 1886 and 1893, this stage may be prolonged for days or even for weeks. If the Bill survive this stage it is 'committed'. Under the Standing Orders of 1907 all Bills, with the exceptions noted below, are referred to one of four Standing Committees. These committees, one of which has special charge of Scotch and another of Welsh business, consist of sixty to eighty members who in party complexion reflect faithfully the composition of the House as a whole. But notwithstanding this fact divisions in these Standing or Grand Committees are apt to follow party lines much less closely than divisions in the House. All Money Bills, and Bills for confirming Provisional Orders, and any other Bill in regard to which the House makes a special order, are sent not to a Standing Committee but to a Committee of the whole House. This is the opportunity for discussion of the clauses in detail, and for amendments thereon. If the Bill is amended at this stage, further detailed discussion and amendment may ensue when it is 'Reported' by the Committee to the House. After 'Report' comes the third reading, which is a final discussion on principle, and on principle illustrated by details which may or may not have formed part of the Bill when submitted for second reading. When no amendments have been made in Committee of the whole House, the Report stage is omitted, but never when the Bill has been 'sent upstairs', i.e. to a Standing Committee. In certain cases there is a further intermediate stage when a Bill, having passed a second reading, is, before submission to Grand Committee or Committee of the whole House, sent to a Select Committee.[1]

The Bill having safely passed through all its stages in the originating House has to go through precisely the same

[1] A Select Committee is really a Committee of inquiry, and takes evidence.

stages in the other House. Should the other House amend it,[1] the amendments have to be reconsidered in the originating House. If they are agreed to, the Bill is sent up for the Royal assent; if not, negotiations ensue and one or other House has to give way. If both stand firm the Bill must be dropped.

In regard to general legislation two tendencies are observable. In the first place, there appears to be an increasing reluctance to utilize the House of Lords for purposes of initiation; nor, curiously enough, is the reluctance confined to the party which is hostile to the Second Chamber. Thirty years ago many important measures of reform originated in the House of Lords, and in view of the congestion of business in the Commons—and in view of the business-like way in which, by general consent, the Lords do their work—it is difficult to understand why there is not a more equitable distribution of legislative work between the two Houses. In Private Bill legislation there is; and to an impartial observer there appears to be no reason why the Lords should not be equally trusted with the initial stages of Public Bills.

Another marked tendency is the increasing autocracy of the Cabinet in regard to legislation. Virtually, a Bill has small chance of passing into law unless it is either promoted or adopted by the Government of the day. To this tendency I have already referred; but there is another symptom of the same malady. To an increasing extent the House of Commons is being deprived of its historic rights of criticism and amendment. Mr. Lowell brings this point out clearly by tabular demonstration. He shows that whereas in 1851, nine amendments in Government Bills were carried against the Government, seven in 1854 and seven in 1856; not a single such amendment was carried from 1874 to 1878, nor in 1880–1, 1889–90, 1897–1900. In fact,

[1] Procedure in the Lords is much more elastic than in the Commons: e. g. amendments may be introduced at any stage.

from 1874 to 1906 the aggregate number of such amendments was only twenty-three—eloquent testimony to the increased subserviency of the House of Commons to the Cabinet.[1] The same careful observer shows also how rapidly the House is depriving itself, by alteration of Standing Orders, and in other ways, of the opportunities for criticizing both the proposed legislation of the Government and its administrative action: 'the House of Commons is finding more and more difficulty in passing any effective vote except a vote of censure. It tends to lose all power except the power to criticize and the power to sentence to death.'[2] Nor must it be forgotten that a sentence of death on the Ministry virtually involves the suicide of the judges, and it is expecting too much of human nature to suppose that members who have spent infinite pains and no little money to get to Westminster will lightly give a vote which must mean for themselves further pains and expenditure and may mean permanent banishment.

It remains to notice procedure in regard to Money Bills The granting of supplies to the Crown and the control of expenditure are, after all, the primary functions of the House of Commons, and it is important to understand exactly how they are performed.

During the autumn the several Departments of Government—the War Office, the Admiralty, the Board of Education, and the rest—calculate how much money they will want for the ensuing year, or, in technical language, 'frame their estimates.' These estimates are submitted to and criticized in detail by the Treasury, and having been passed by the Treasury are then approved by the Cabinet. Before March 31, when the financial year ends, they must be submitted by the responsible Ministers to the House of Commons For the purpose of considering these estimates

[1] Perhaps this phenomenon may be otherwise explained. Governments are increasingly sensitive to defeat, and therefore are more apt to *accept* amendments both of principle and of detail.

[2] *op. cit.* i. 355.

the House resolves itself into Committee of Supply—a Committee of the whole House which is differentiated from ordinary sessions only by greater elasticity in the rules of debate and by the fact that the Chairman of Committees presides in place of the Speaker. Committee of Supply—or rather the motion for going into Committee used to afford the supreme opportunity for criticism of the Executive; but by alterations in Standing Orders these opportunities are now seriously curtailed. Not only are the opportunities reduced in number but criticism may no longer range from China to Peru; it must be relevant to the vote about to be discussed.[1]

Another rule much more ancient and of far wider significance must here be mentioned. Only the Crown through its Ministers can propose expenditure. Unofficial members may move to reduce a vote, but not to increase one; least of all to initiate one. This rule, originally and still technically nothing more than a Standing Order of the House of Commons, has now been accepted as a Constitutional maxim of almost sacred validity. It is generally regarded as the last effective barrier that remains against the indulgence of philanthropic benevolence at other people's expense. It also relieves pressure upon individual members at the hands of individual constituents. It is always easier for a representative body to spend than to resist expenditure. This salutary rule minimizes, though of course it does not remove, the danger in the case of the greatest of representative assemblies. A Minister must as a rule be convinced of the need for expenditure, not in the heated atmosphere of the House, but in the cool and critical seclusion of his Department. A Minister of the Crown may indeed be induced by the indirect pressure of debate to substitute a larger for a smaller sum in the Estimates: but it must be proposed on his sole responsibility. A particular group may desire, for example, to double the grant to the unemployed; the

[1] Until 1882 *any* question might be raised on the motion that 'the Speaker leave the chair', i.e. that the House should go into Committee.

Parliamentary method for doing this would probably be to move a reduction in the salary of the responsible Minister. The protest might eventually prove effective; but the Standing Order at least provides a guarantee against impulsive generosity due to gusts of collective philanthropy.

The Constitutional theory which really underlies the whole of this procedure has never been more lucidly stated than by Erskine May:

'The Crown demands money, the Commons grant it, and the Lords assent to the grant; but the Commons do not vote money unless it be required by the Crown; nor impose or augment taxes unless they be necessary for meeting the supplies which they have voted or are about to vote, and for supplying general deficiencies in the revenue. The Crown has no concern in the nature or distribution of the taxes: but the foundation of all Parliamentary taxation is its necessity for the public service as declared by the Crown through its constitutional advisers.'

To resume the chronological order. Resolutions of Supply having been carried in Committee have subsequently to be reported to the House and embodied in a Bill or Bills authorizing the expenditure on the specified objects approved by Parliament. These Bills or Acts of Appropriation are for reasons of financial convenience passed at intervals during the Session, but at the close of the Session they are all collected and consolidated into one grand Appropriation Act. This procedure, it must be observed, applies only to what are technically known as the 'supply' services—the Army, Navy, and Civil Service. Something less than half the expenditure of the Crown is regulated not by annual but by permanent Acts of Parliament. The Civil List of the Crown itself; the salaries of the Judges; pensions; the payment of interest on the National Debt, &c., are charged by permanent Acts upon the Consolidated Fund (of which more hereafter) and do not, therefore, come under the annual review of Parliament.

The same is true of the sources of revenue. Much the greater part of the revenue is raised under the sanction of

permanent Acts. Such Acts may, of course, like other Acts, be repealed or amended at the discretion of Parliament; and frequently are. But they do not call for annual re-enactment. Every year, however, the whole financial system does in effect pass under the review of the House of Commons, when it proceeds to discuss how the supply voted to the Crown is to be 'made good'—in other words, how the money is to be found to meet the authorized expenditure.

For the performance of this important function the House resolves itself into a *Committee of Ways and Means*. It is to this Committee that the Chancellor of the Exchequer presents his *Budget* or statement on the national accounts. This statement, which is due as soon as may be after the close of the financial year (March 31), falls into three parts; a review of revenue and expenditure during the year that is ended; a provisional balance-sheet for the year to come, and proposals for remission of existing taxes or imposition of new ones. Although part of the revenue and part of the expenditure is 'permanent', a very large balance of both depends on annual votes, and each financial year is absolutely self-contained. It is the business of the guardian of the national purse to look twelve months ahead, but (in a technical sense) no further. This rule is enforced by the provision that money voted to a Department but unspent during the current year cannot legally be 'carried forward'. All such casual balances go automatically to the reduction of debt. This rule may, despite the sleepless vigilance of the Treasury, occasionally operate in the direction of petty extravagance in the closing weeks of a financial year. No Department likes to confess that it has asked for more than it needs. But appropriation is exceedingly minute; money voted to the Admiralty for men cannot be spent on guns; nor may the War Office spend on horses what it has received for stationery.[1] Petty extravagance, therefore, is more than

[1] *Temporarily* a vote taken for one branch of the Service may be spent on any other; but ultimately the appropriation must be strictly observed.

counterbalanced by large economy, and still more by the supreme advantage of knowing each year precisely how we stand financially. There are critics who maintain that the safeguards are illusory; and it is not given to every layman to be able to unravel the tangled skein of a balance sheet; but at least it may be said that, thanks to the co-operation of amateur and expert, the national balance sheet is more intelligible than most. Moreover, though it is true that in all criticism of administrative acts the permanent official is at an immense advantage, it must be remembered that the official Head of the Treasury is no more permanent than his critics, and that though he can command sources of information denied to them, he enjoys in this respect only a temporary advantage. To-morrow the tables may be turned; the critic may preside at the Treasury Board, the Chancellor of the Exchequer may be playing the rôle of critic.

The national Balance Sheet or Budget may be best understood by a concrete example.

The proposed Budget for 1910–11 is as follows:—

ESTIMATED EXPENDITURE.

	£
Consolidated Fund Services	36,945,000
Army	27,760,000
Navy	40,604,000
Civil Service	42,686,000
Customs and Excise	4,034,000
Post Office	19,828,000
	£171,857,000

ESTIMATED REVENUE.

	£
Customs	32,095,000
Excise	34,270,000
Estate and Death Duties	25,650,000
Stamps	9,600,000
Land Tax and House Duty	2,690,000
Income and Property tax	37,550,000
Land Value Duties	600,000
Non-tax Revenue (including Post-Office receipts)	27,290,000
	£169,745,000

Under normal circumstances this would show a deficiency in revenue of over £2,000,000; but owing to abnormal causes there were arrears of revenue due from 1909–10 more than sufficient to cover the adverse balance. It is perhaps desirable to add that of the £36,000,000 due for Consolidated Fund Services some £25,000,000 is required for provision of interest and sinking fund for the National Debt; of the £42,000,000 due for the Civil Service, Education absorbs about £14,000,000 and Old Age Pensions over £9,000,000. On the Revenue side, liquor and licences provide about £40,000,000 (customs and excise), and tobacco about £14,000,000. Were the people to suddenly give up smoking and drinking, the Exchequer, as things are at present, would be bankrupt.

To return to the explanation of Procedure.

In *Committee of Supply* the House determines the amount to be spent on each particular object; in *Committee of Ways and Means* it decides how the money is to be raised. In both cases the 'resolutions' arrived at in Committee have to be 'reported' to the Houses and to be embodied in Bills which, with the assent of the Lords and the Crown, become Acts.

But how can the House of Commons be sure that its orders have been strictly carried out? This question carries us from the region of the Legislature to that of the Executive; but it may be briefly answered here in order to complete our review of the subject.

The principle of 'appropriation' was successfully asserted by the Commons under Charles II, but the machinery was inadequate. It was improved at the Revolution, when the produce of specific taxes was assigned to meet specific charges. But this method has obvious disadvantages. The modern system dates from the time of one of the greatest of our financiers—the younger Pitt. In 1787 Pitt established the *Consolidated Fund*. Into this vast financial reservoir flows

'every stream of the public revenue', and from it issues 'the supply for every public service'.[1] The pivot upon which the whole working of the financial machinery now depends is a functionary known as the Controller and Auditor General. He is a non-political official created by the Exchequer and Audit Act of 1866; his independence is secured by the fact that his salary is charged upon the consolidated fund, and that he is not permitted to sit in Parliament. All money collected by the fiscal officials—Inland Revenue, Post Office, and Woods and Forest Commissioners—is paid into the Exchequer account at the Bank of England and the Bank of Ireland. Not a penny can be withdrawn from that account without the sanction of this potent individual, the Controller and Auditor General, who presents annually to Parliament an audited account together with a Report in which it is shown that the sums voted by the House of Commons to the several enumerated purposes have been expended strictly upon them and not otherwise. Before he can do so he must of course satisfy himself that the payments which he has authorized were in accord with the intentions of Parliament, and that they have actually been spent upon the objects to which they were appropriated.

With his Report, which is examined in detail by the Public Accounts Committee who report on it to the House, the circuit of financial security may be said to be complete.

Apart from financial control and legislation there is one other function of Parliament to which I have referred and as to the performance of which some words must be added. The House of Commons is, in the clumsy but expressive phrase of Sir John Seeley, a 'Government-making organ'. To be accurate, the House of Commons has no power to 'make Governments', but it has virtual powers of dismissal. These may be exercised in one of three ways: (1) the House may refuse supplies to the Crown, or (2) may defeat a measure

[1] 13th Report of Commissioners of Public Accounts, p. 60.

on which the Government has explicitly or implicitly staked its existence, or (3) it may pass a direct vote of want of confidence. No Ministry could, under the Constitutional conventions which now prevail, retain office after such a vote, unless it had reason to believe that the House of Commons did not represent the opinion of the electorate. In this case it might appeal from the House to the constituencies, and act in accordance with the verdict of the latter. But it is to be observed that such an appeal could take place only with the concurrence of the Sovereign, who might prefer to insist upon the resignation of his Ministers, and the transference of office to other Ministers. But the Sovereign's prerogative is in turn ultimately limited by the will of the House of Commons. He could insist upon the resignation of one Ministry, only if the House was prepared to extend its confidence to another; or if, failing this, he was prepared to dissolve Parliament and appeal to the constituencies on behalf of his new Ministry.

Such is the nice equipoise, the delicate balance of the forces which control the working of that complex organism —the English Constitution.

CHAPTER XII

LOCAL GOVERNMENT: (1) RURAL

'England alone among the nations of the earth has maintained for centuries a constitutional policy; and her liberties may be ascribed above all things to her free local institutions. Since the days of their Saxon ancestors, her sons have learned at their own gates the duties and responsibilities of citizens.'—SIR T. ERSKINE MAY.

'Local assemblies of citizens constitute the strength of free nations. Town meetings are to liberty what primary schools are to science; they bring it within the people's reach; they teach men how to use and how to enjoy it. A nation may establish a system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty.'—TOCQUEVILLE.

'Year by year the subordinate government of England is becoming more and more important. The new movement set in with the Reform Bill of 1832; it has gone far already and assuredly it will go farther. We are becoming a much governed nation, governed by all manner of councils, boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes.'—F. W. MAITLAND.

'Whatever "Educative" value is rightly attributed to representative government largely depends on the development of local institutions.'—HENRY SIDGWICK.

THE nineteenth century witnessed, as we have seen, a far-reaching revolution in the constitution of the central legislature. It witnessed a revolution hardly less striking in the structure and machinery of local administration. When the century opened, and indeed, throughout more than three-quarters of its course, the squirearchy, officially represented by the County Magistrates, were securely established in the citadel of Local Government. From their dominating position in Parliament they were driven, theoretically, by the Act of 1832, practically by that of 1867. But

in County Government they continued to bear sway until 1888.

The Corporate Municipalities at the opening of the last century, were governed by Corporations which for the last four hundred years had been steadily growing more oligarchical in character. These local urban oligarchies survived the overthrow of the great central oligarchy by only three years, one of the first-fruits of the reformed Parliament being the Municipal Reform Act of 1835.

I propose, in the present chapter, to describe in outline the existing machinery of Local Government. But if it be true of the Central Government that the roots of the present lie deep in the past, and that consequently analysis of existing conditions is unintelligible without some historical retrospect, not less but even more is this true of Local Government.

The towns, whatever their origin (a highly debatable question) have almost from the first been regarded as something anomalous and exceptional. But, apart from them, there have, from time immemorial, been three main areas of local administration: the Shire or County, the primary unit of the township (or Parish), and the intermediate area of the Hundred—represented later by the Union, and now in some sort by the District.

The history of Local Government divides into four great periods: (i) the first extends from the earliest times down to the Norman Conquest; this may be distinguished as the period of popular Local Government; (ii) the second, from the Norman Conquest to the fourteenth century, a period of strong and centralizing monarchy; (iii) the third, from the fourteenth century to 1888—an aristocratic period, and (iv) the fourth, from 1888 onwards, a period increasingly democratic in tendency.

The Shire, or County, as the most important area of Local Government, must engage our attention first. From

the earliest times to the present one officer has maintained in the Shire his position, though the position has implied at different times very varying degrees of authority. That officer is the Shire-reeve or Sheriff. From Saxon days to those of the later Plantagenets the Sheriff was the pivot of county administration; in the fourteenth century he was superseded, for most purposes, by the Justices of the Peace, as they in turn were, for many purposes, superseded in 1888 by elected County Councils. But the office still survives all vicissitudes.

The earliest Shires, such as Kent, Sussex, Middlesex, Essex, Norfolk, Suffolk, Dorset, Somerset, represent the original settlement of Teutonic tribes, and in some cases original heptarchic kingdoms. Thus Kent represents the original kingdom of the Jutes, Sussex of the South Saxons, and so forth.

The next batch of Shires represent artificial delimitation rendered possible by the West-Saxon re-conquest of the Danelaw. In these cases the Shire takes its name from the principal or 'County' town, as in Oxfordshire, Hertfordshire, Warwickshire, Worcestershire, Lincolnshire, Nottinghamshire, Northamptonshire, and so on. A few Shires such as Cumberland and Lancashire represent even later absorptions or delimitations. Latest of all were the counties of Wales.

In every Shire there was a Court consisting partly of elected representatives from the subdivisions of the Hundred and Township, partly of nominated members. This Court or Moot represented the folkmoot or Witan of the original Teutonic kingdoms—the *Civitas* described in the *Germania* of Tacitus. Its roots therefore lay in the most distant past. It met twice a year for the dispatch of business, legislative, administrative, and judicial. Its officers were the Ealdorman (afterwards Earl), the Bishop, and the Sheriff. The first was a national officer appointed

by the King and the National Council (Witenagemot), but he originally represented the old royal houses in the Shires which had been independent kingdoms. With the Ealdorman sat the Bishop, representing an authority not yet differentiated from that of the State, while the Sheriff was the special representative of the King or Central Government, responsible to the King for the local administration of justice and for the collection of all financial dues.

After the Norman Conquest the importance of this functionary was rapidly enhanced. The Norman and Angevin kings, quick to adapt existing institutions to their own purposes, saw in the Sheriff and the popular Court of the Shire valuable instruments for holding in check the disruptive tendencies of the feudal system. To this end the Sheriff and his Court were sedulously encouraged and maintained.

The survival of popular local institutions is, indeed, one of the many benefits which England derived from the exceptionally early development of the royal power and from the creation of a central administration exceptionally strong and efficient. Had the Norman Conquest imported into England the feudalism of France, the free local institutions which were so characteristic a feature of the Anglo-Saxon polity must inevitably have perished. A monarchy, powerful and in some respects highly centralized, found its most trustworthy support against the barons in the local institutions and officials inherited from pre-Conquest days. The advantages were mutual. The Crown relied upon the people in the contest against feudal independence; the people found in the Crown their most efficient protector against local tyranny.

When, under Henry I and still more under Henry II, the administrative and judicial system was reorganized, when regular circuits of officers of the central *Curia* were instituted, it was the Sheriff who had to prepare for their coming, and it was in the Court of the Shire that their

duties, fiscal and judicial, were performed. It is to-day the chief surviving function of the Sheriff to prepare for the coming of the King's Judges of Assize, to attend them in Court, and to execute the sentences they pronounce.

Towards the end of the thirteenth century, still more rapidly in the fourteenth, the power of the Sheriff declines. In the Justice of the Central Court (*Curia Regis*), with his regular circuits, the Sheriff had long had a serious rival. The development of feudal jurisdiction in the manorial courts had already impaired his authority locally. But the most serious blows came from the development of central representation in Parliament, and the evolution of a new set of local functionaries, originally designated Guardians of the Peace (*Custodes Pacis*), and from 1360, Justices. The rise of the House of Commons diminished the lustre of the local moots of the Shire, but at the same time, as we have seen, gave them a new and important function. The Sheriff became the returning officer for knights and burgesses and in his Court they were elected. This duty, as regards county elections, the Sheriff still retains.

From the mediaeval Shire we may pass to the *Hundred*. What was the origin of the Hundred? That is a question which would involve us in a prolonged antiquarian inquiry from which we should emerge without any certainty. The Hundred may have originated in the settlement of a hundred warriors of the Teutonic host; or perhaps we must regard it as a unit for the assessment of taxation; or possibly as an artificial subdivision of the Shire selected primarily for police administration by one of the later Saxon kings. We cannot positively say. But certain points are clear. The Hundred, if a territorial subdivision, was not of uniform size; there were sixty-three Hundreds in Kent, sixty-four in Sussex, but only five in Leicestershire. If the Hundred was the area originally occupied by one hundred warriors this discrepancy would be accounted for. Further, we know that

in later Saxon days the Hundred moot or Court was the ordinary resort of the men of the Hundred for the administration of justice, civil and criminal; further, that 'all the suitors were the judges', though they acted through a jury of twelve. The Court met monthly, and twice in the year the Sheriff attended and held his 'tour' to see that the police regulations of the district were being faithfully observed. After the Norman Conquest, however, the importance of the Hundred Court somewhat rapidly diminished. Its decay was due partly to the development of private jurisdictions in the manorial courts of the feudal lords, and later to the increasing ubiquity of the King's judges and the growth of the Royal Courts.

But in the judicial and administrative system of the Angevin kings the Hundred had still an important place. It was still the unit of the police system; of the military system for the arming of the people in the national militia; it was still responsible for the pursuit of malefactors, and for presenting, through its grand jury of twelve lawful men, the criminals of the district for trial before the King's Judges of Assize. Of this last function there are still lingering traces. Thus Manchester for assize purpose is still in the 'Hundred' of Salford; Liverpool in that of West Derby; Birmingham in that of Hemlingford. Down to 1886 the Hundred was still responsible for damages due to riots. But long before that the Hundred and its Court had for all practical purposes ceased to exist, and to-day the interest which attaches to it is purely antiquarian.

It is far otherwise with the Township—the Vill or Tun[1], the unit of local self-government from time immemorial. Into Townships the whole of England was exhaustively divided, and the Township was, as Maitland points out, selected by the State as the 'unit responsible for good

[1] This is not the place for the discussion of the highly technical question as to the precise character of the Vill.

order'. As a unit for fiscal purposes the Township, as we have seen, was represented in the Court of the Shire by the 'Reeve and four best men', and it is from the Townships on the royal demesne that John first summoned representatives to the Central Assembly of the realm. Yet the name 'township', still more 'vill', has an antiquarian flavour. And for a simple reason. From the seventh century the 'Township' was captured by the Church as the unit of ecclesiastical organization, and for all practical purposes became henceforward known as the 'Parish' (παροικία), or dwelling-place of the priest.

But before final victory was assured to the 'Parish' a long contest was waged between the ecclesiastical and the feudal authorities; between the Court of the Parish Meeting in the Vestry, and the feudal Courts of the Manor. That the cause of the Church was the cause of freedom cannot be denied, and to that side victory ultimately inclined, but the strife was long and bitter.

At an early stage the Township virtually disappeared. Even before the Norman Conquest a very large number of 'Townships' had become dependent upon a 'lord', or, in technical language, had become manors—a *manerium* being merely, in the first instance, the abiding-place of a lord, just as a 'Parish' was the dwelling-place of the priest Into the history of the manor, with its elaborate organization, social, agricultural, and judicial, it is impossible to enter here. It must suffice to point out that for all practical purposes the legal Township merged, from the eleventh century onwards, into a manor, and as a manor was regarded and organized until the decay of feudalism in the fourteenth century and the reorganization of Local Government under the Tudor sovereigns. When the Township re-emerged from under the ruins of the feudal superstructure elaborately imposed thereon, it was as the 'Parish' selected by the Tudors to be the unit of their new administrative system.

We are now approaching the close of the second great period in the history of Local Government. The popular or (to adopt Maitland's emendation) the 'communal' Courts of Shire and Hundred have fallen into all but complete decay. The Shire Court had lost its criminal jurisdiction before the end of the thirteenth century, and by the end of the fifteenth the Courts both of Shire and Hundred survived only as 'petty debt courts held by the under-sheriff'—a function to which, curiously enough, the new County Courts of the nineteenth century have been primarily devoted.

The Shire Court has already entered upon a new phase of political importance; but in a judicial sense the old Communal Courts have gone down before the competition first of the feudal, then of the royal Courts, while the presiding officer, the Sheriff, has similarly given place to the Justice of the Peace or County Magistrate.

The power of the 'provincial viceroy' had been waning ever since the great commission of inquiry known as the *Inquest of Sheriffs* (1170). The growth of the power of the 'Legal Knights', culminating in their admission to Parliament; the development of towns (to be noticed presently), with their independent fiscal and judicial powers; the institution of the office of *Coroner* (1194), and the significant transference of criminal jurisdiction from the Sheriff in the Great Charter (1215)—all these represent stages in the decay of the authority of this once all-powerful functionary. The end really came with the institution of a new class of local officials ultimately known as Justices of the Peace.

The origin of the new office may be found in the *Proclamation for the preservation of the Peace* (1195), by which knights were appointed to receive the oaths for the maintenance of the peace. Knights were similarly assigned to 'maintain the peace' in 1253 and 1264, and in 1285 *Custodes Pacis* were elected in the County Courts to secure the enforcement of

the great police measure, the *Statute of Winchester*. By an Act of 1327 Conservators of the Peace were to be appointed in every county, and thirteen years later the office of Sheriff became an annual one. 'No Sheriff shall tarry in his bailiwick over one year' (14 Edward III, c. 7). In 1360 the Conservators of the Peace were transformed into 'Justices of the Peace', and were endowed with authority to try felonies. Two years later the new Justices were required by Statute to hold meetings four times a year, and thus *Quarter Sessions* knocked the last nail into the coffin of the old communal Court of the Shire.

The fifteenth century was a period of rapid constitutional development and ever-increasing social anarchy. Reiterated complaints laid before the House of Commons, taken together with the revelations of contemporary literature,[1] afford conclusive testimony to the prevailing sense of 'lack of governance', and point at the same time to some of the causes and symptoms of the disease. Perhaps the most sinister phenomenon was the revival of a 'bastard' form of feudalism and the emergence of the 'over-mighty subject'. 'Certainly,' wrote Fortescue, 'ther mey no grettir perell growe to a prince, than to have a subgett equepotent to hym selff.' The most disquieting symptom of the new feudalism was the growth of a custom of 'ivery and maintenance'. The great lords surrounded themselves with crowds of retainers—many of them disbanded soldiers who had fought in the French wars—who wore their livery and fought their battles, while in return the lords 'maintained their quarrels and shielded their crimes from punishment'. The 'livery of a great lord was', says Bishop Stubbs, 'as effective security to a malefactor as was the benefit-of-clergy to a criminous clerk'. One of Suffolk's men boasted 'that his lord was able to keep daily in his house more men than his adversary

[1] Notably Fortescue: *Governance of England* (ed. Plummer), and the *Paston Letters* (ed. Gairdner).

had hairs on his head'.[1] Repeated complaints were lodged by the House of Commons. Thus in 1406 they complained that 'bannerets, knights, and esquires gave liveries of cloth to as many as three hundred men or more to uphold their unjust quarrels and in order to be able to oppress others at their pleasure. And no remedy could be had against them because of their confederacy and maintenance'. Legislation was repeatedly attempted; but legislation was wholly ineffective to remedy the disease. What was needed was strong and equal administration. The country was 'out of hand'; law was paralysed; judges and jurors were equally corrupt or equally intimidated by the 'over-mighty subject'. The *Paston Letters* teem with illustrations of the prevailing evils. 'Nothing is more curious', writes Mr. Plummer, 'than the way in which it is assumed that it is idle to indict a criminal who is maintained by a powerful person; that it is useless to institute legal proceedings unless the sheriff and jury can be secured beforehand.'[2] The natural consequence ensued. All who had might took the law into their own hands. Private wars were common as they had never been since the evil days of Stephen. Noble was at war with noble, county with county.

It was this social anarchy which called for the strong hand of the Tudor 'dictators', to whom for a time men were willing to surrender much to obtain the supreme blessing of administrative order.

The Tudors took vigorously in hand the reorganization of Local Government. With their sure instinct for the vitalities they took the *Parish* as their administrative unit, and made the *Justice of the Peace* their man-of-all-work. William Lambarde, writing under Queen Elizabeth, complains that he and his brother magistrates were utterly overloaded, and fears that their backs would be broken by these 'not loads,

[1] Plummer's *Fortescue*, p. 27.
[2] Ibid., p. 29.

but stacks of statutes'. His groans were not without justification. Henry VII passed twelve, Henry VIII no less than fifty, Edward VI nineteen, Queen Mary nineteen, and Queen Elizabeth fifty-four statutes (down to 1579 only) affecting in one way or another the functions of this overburdened official. Well might Sir Thomas Smith, also writing under Queen Elizabeth, declare that 'the Justices of the Peace be those . . . in whom the Prince putteth his special trust'. We must try, therefore, to get some notion of the work which the Justice of the Peace at this period had to do.

He was at once judge, policeman, and administrative man-of-all-work; he was responsible for the trial of criminals, for the maintenance of order, and for carrying into effect that huge mass of social and economic legislation which was particularly characteristic of Tudor rule. He was primarily a judge. In his own parish he sat alone and tried petty cases without a jury; four times a year he met his brother magistrates of the whole county in Quarter Sessions; later on (in 1605), an intermediate division was created in which he sat with two or more brethren in Petty Sessions. But his special significance in relation to the Tudor Dictatorship consists in the multitude of administrative duties which he was expected to perform. He had to fix the rate of wages for servants and labourers; to bind apprentices and cancel indentures; to fix the prices of commodities; to appoint and dismiss constables; to see to the maintenance of gaols and bridges and highways; to supervise the payment of pensions to maimed soldiers and sailors; to determine all questions of settlement and affiliation; to search out recusants and enforce the law against them, and to see that Sunday was properly observed. He was the sole sanitary authority, the sole licensing authority (for all trades except monopolies), and the chief poor law and vagrancy authority. Such were some of the many duties under which

Lambarde groaned. And no shirking was possible; for at every assize the Clerk of the Peace had to hand in a certificate giving the names of all Justices absent from Quarter Sessions since the last assize, and the Judge had to examine into the cause of absence, and report thereon to the Lord Chancellor.[1]

But there can be no question that on the whole the work was admirably done, and that social order was gradually evolved out of the weltering chaos of the fifteenth century. It was good for the country, and it was good for the Justices. Nothing is more striking than the contrast between the turbulent neo-feudalism of the fifteenth century—Percies and Nevilles and the rest—and the legally-minded, Parliament-loving squires of the seventeenth century, the Pyms, Eliots, and Hampdens. The explanation of the contrast may, I suggest, be found in the training and discipline of the Justice of the Peace under the 'dictatorship' of the intervening century.

In their administrative reorganization the Tudors, as we have seen, selected as their unit the Parish, and upon the Parish they thrust a new responsibility which from that day to this has been popularly regarded as its most distinctive work. To accept poor-relief is in the vernacular 'to go upon the parish'. The popular phrase is characteristic of Tudor administration.

The sixteenth century witnessed an economic revolution into the details of which it is impossible to enter, but this one symptom of it, as closely concerning local administration, must be briefly noticed here. Throughout the whole period we have evidence of the anxiety of the Tudors to grapple with the problem of pauperism, vagrancy, and unemployment. Vagrancy and the crimes incident thereto are the first objects of their legislative solicitude; but hand

[1] On the whole question cf. Hamilton, *Quarter Sessions under Elizabeth and James I.*

in hand with penal measures directed against 'lusty vagabonds' and 'valiant beggars' we have provision for 'poor, sick, impotent, and diseased people being not able to work' who 'may be holpen and relieved'. But the relief is to come from charity, the help from individuals. The State will exhort to good works, but hesitates to undertake them. There is considerably more than half a century of exhortation and experimental legislation before in 1601 the State, at last convinced of the inadequacy of voluntary effort, steps boldly in, and assumes a new and, as it was to prove, an almost overwhelming responsibility. It is the English way; in the main, a wise way. The great Poor Law of 1601, when at last it comes, is characteristic of Tudor thoroughness and method. Poor Relief is definitely recognized in principle as a matter of public concern; the *Parish* becomes the area of administration; the instruments are to be *Overseers* appointed and controlled by the *Justices of the Peace*. Funds are to be raised by a weekly rate levied parochially, and are to be applied for the benefit of three distinct categories:—

(*a*) the 'lusty and able of body' who are to be 'set on work';

(*b*) the 'impotent' poor who are to be relieved and maintained; and

(*c*) the children who are to be apprenticed to trades, the boys till the age of 24, the girls to that of 21, or until marriage.

This Act, as will be seen, is the foundation of the English Poor Law system, and for a period of more than two hundred years governed the administration of Poor relief. Under Charles II it was found necessary to define 'Parishioners', and the Act of Settlement, which inflicted great hardship on the poor, was the result. Early in the eighteenth century the system was overhauled, the cost of Poor relief was mounting rapidly without adequate reason

and the result was an Act (1723) which provided for an enlargement of the area of relief; the formation of unions of parishes; the building of workhouses and the imposition of a workhouse test. During the next half century administration was greatly improved, but the last two decades of the eighteenth and the first three of the nineteenth century witnessed a terrible relapse. There was some excuse. The coincidence of the greatest Economic Revolution in world history, and a war, unusually prolonged, undoubtedly created problems, social and industrial, such as no administrators had ever had to confront before. Some of the legislation and most of the administration was undeniably due to a combination of panic and philanthropy; a fear lest the scenes of the Terror might be re-enacted in London, and a desire to relieve the suffering almost inevitably entailed by a period of rapid economic transition upon the weakest economic class. Gilbert's Act (1782) was a permissive measure passed to enable the overseers to dispense with the 'workhouse test' and to make allowances in aid of wages to able-bodied labourers. The principles thus enunciated were carried further and translated into action by a resolution of the Berkshire magistrates, adopted at a meeting at Speenhamland in 1795. This resolution, known as the 'Speenhamland Act', recommended the farmers to raise wages in proportion to the increase in the price of provisions. If the farmers refused, the deficiency was to be made good out of the rates. The example of Berkshire was followed throughout the greater part of England, south of the Trent, and with disastrous results. Pauperism became endemic among the agricultural labourers; rates rose with appalling rapidity[1]; rent was swallowed up in rates; land not seldom

[1] The total expenditure on Poor Relief was:—

In 1760	= £1,250,000	or 3/7	per head of population.
1803	= £4,077,000	,, 8/11	,, ,, ,, ,,
1818	= £7,870,000	,, 13/3	,, ,, ,, ,,
1887	= £9,008,180	,, 5/10½	,, ,, ,, ,,

went out of cultivation; worst of all, whole districts became hopelessly demoralized; it did not pay for a man to be industrious or a woman to be chaste. From a situation which in the south at any rate was threatening, England was saved by the Poor Law Amendment Act of 1834. This Act abolished, by a stroke of the pen, outdoor relief to the able-bodied; it imposed a rigorous workhouse test; it enlarged the area of administration from the Parish to the Union; it established a central Board of Poor Law Commissioners and systematic inspection in the hope of securing some uniformity of administration; it relaxed the Law of Settlement, and it committed the local administration of Poor relief to Boards of Guardians, consisting partly of magistrates, who sat *ex-officio*, and partly of guardians elected *ad hoc* by those who paid the rates. Thanks, in large measure, to the remarkable set of men into whose hands the central administration of the Act fell, it proved a conspicuous success. It restored to the working classes a sense of independence almost lost; it relieved property of an intolerable strain; it reduced rates and diminished pauperism.

But I am concerned here less with the social and economic results of the Act than with its bearing upon local administration. It marks the first inroad upon the system established by the Tudors, the beginning of the end of the old order, which was based territorially upon the Parish, and in an administrative sense upon the County Magistracy. An administrative area, intermediate between Shire and Parish, reappears—that of the Union, and the principle of election as applied to local administrators takes its place by the side of the autocratic principle embodied in the Justice of the Peace.

That principle had been rapidly gaining ground during the period which intervened between the Poor Law of Elizabeth and the Amending Act of 1834. Down to the end of the seventeenth century the County Magistracy had been held in check partly by the Crown and by the general

application of the writ of *Certiorari*, which compelled the attendance of the magistrates to answer for their doings before the King's Court; partly by the existence of a large and powerful class of yeomen, small landowners and big farmers, whose influence in local business was not yet swamped by that of the great territorial magnate. But with the Revolution of 1688 there dawned the brief day of the political and social ascendancy of the landed aristocracy. I have already noted in another connexion the fact and the reasons for it.[1] The imposition of a high qualification in landed property for the tenure of certain offices—for Members of Parliament, County Magistrates, Deputy Lieutenants, and Militia officers—made the discharge of administrative functions dependent for the first time upon the ownership of land. From 1688 to 1888 the County Magistrates had it all their own way in local administration; and their work was by general admission admirably done. It was efficient and economical. But long before the great revolution was effected in 1888 and 1894 there had been a demand, increasingly articulate, for a radical reform of local government in the rural districts.

For this there were many reasons. Half a century had elapsed since the breakdown of the oligarchical system in the towns, and it was thought that the time for the application of a similar principle to county government was overdue. Moreover, the democratic idea had been waxing strong, as was proved, *inter alia*, by the Reform Acts of 1867 and 1884. Perhaps in consequence of the growth of political democracy, the State was every day assuming larger and larger responsibilities. Some of these the central government wished—and very properly—to delegate to local administrators. But most of the new functions involved financial responsibility, and it was contrary to the fashionable principles to entrust this to non-elected bodies.

[1] Cf. *supra*, p. 151.

The principle of 'no taxation without representation' demanded that if the local authorities were to be charged with duties involving large expenditure, they must be directly responsible to the local tax-payer.

But there was a more potent and pressing reason for reform. During the last half century local government had been sinking deeper and deeper into chaos. It was as Mr. (afterwards Lord) Goschen said, a 'chaos of authorities, a chaos of jurisdictions, a chaos of rates, a chaos of franchises, a chaos worst of all of areas.' In 1883 there were no fewer than 27,069 independent local authorities, taxing the English ratepayer, and taxing him by eighteen different kinds of rates. Among the 'authorities' were Counties (52), Municipal Boroughs (239), Improvement Act Districts (70), Urban Sanitary Districts (1,006), Port Sanitary Authorities (41), Rural Sanitary Districts (577), School Board Districts (2,051), Highway Districts (424), Burial Board Districts (853), Unions (649), Lighting and Watching Districts (194), Poor Law Parishes (14,946), Highway Parishes not included in urban or highway districts (5,064), Ecclesiastical Parishes (about 1,300).

How had this 'jungle of jurisdictions[1]' arisen? For the last half century Parliament had been busily at work attempting to adapt the existing framework of the administrative system to the rapidly changing conditions of a rapidly increasing population. And this had been done, perhaps inevitably, by a long course of tinkering, piecemeal legislation. No attempt whatever was made to fit in the new with the old. Act was piled upon Act; each involving new administrative functions and each creating a new authority to perform them. The result was an appalling mass of overlapping, intersecting, and conflicting jurisdictions, authorities, and areas, bewildering to the student and fatal to orderly administration.

[1] Chalmers: *Local Government.*

Reform was imperatively demanded in two directions: (i) the concentration of authorities; and (ii) the readjustment and simplification of areas.

These may be regarded as the guiding principles of the Local Government Acts of 1888 and 1894. The former, popularly known as the County Councils Act, (i) provided for the creation of 62 'Administrative Counties', some of them coterminous with the 52 historic shires, but some representing subdivisions of the same, and sixty or more[1] 'county boroughs'—towns with more than 50,000 inhabitants; (ii) set up in each county or county-borough a council consisting of (*a*) councillors elected for a term of three years by the ratepayers, (*b*) co-opted aldermen, who were not to exceed in number one-third of the elected councillors; (iii) transferred to these councils the *administrative* functions of *Quarter Sessions*, such as the control of pauper lunatic asylums, of reformatory and industrial schools, local finance, the care of roads and bridges, the appointment of certain county officials, &c.; (iv) left to the *Justices of the Peace* all their *judicial* and licensing functions; and (v) committed to a *Joint Committee* of Justices and County Councillors the control of the county police force. To the above important functions of the County Council, subsequent Acts (1889 and 1902) have added that of the control of education, higher, secondary, and elementary.

The Act of 1888, at once radical in scope and conservative in temper, has, in the main, more than fulfilled the anticipations of its authors. The county magistrates, instead of sulking at their partial dethronement, came forward with public spirit to assume a new role and new duties. To their experienced guidance is owing the fact that a profound transition has been effected without friction and without breach of continuity. The elected councils have in the main proved themselves, if not economical, undeniably efficient.

[1] There are now (1910) 74 County Boroughs.

Complementary to the County Councils Act of 1838 was the District and Parish Councils Act of 1894. Every county is, under the latter, divided into *districts*, urban and rural, and every district into *parishes*. In every district and in every rural parish (with more than three hundred inhabitants) there is an elected council; in the smallest parishes there is a primary meeting of all persons on the local government and parliamentary register.[1] To the parish council or meeting the Act has transferred all the civil functions of the vestries, with the control of parish properties, charities, footpaths, &c. Ambitious parish councils have also the power to 'adopt' certain permissive Acts for providing the parish with libraries, baths, light, recreation grounds, &c. The vestry still retains control over purely ecclesiastical matters—including ecclesiastical charities.

To the intermediate or district council, whether urban or rural, have been transferred the control of sanitary affairs and highways. Councillors for rural districts also act as Poor Law Guardians, each for the parish for which he is elected a district councillor. Thus in rural districts there are no longer any separate elections for guardians. An urban district is virtually a municipality with something less of dignity and less coherence, but with equal powers. There are more than 800 such districts in England to-day, ranging in population from 300 to nearly 100,000. But the largest districts tend naturally to apply for and obtain 'incorporation' as 'boroughs.'

The Acts of 1888 and 1894 have unquestionably done much to bring order out of the chaos which had existed in local government for the previous half century, and more recent legislation has shown an increasing tendency to

[1] This includes women and lodgers. Parishes of less than 300 inhabitants *may* have Councils, if they desire it. The smallest Parishes (under 100 inhabitants) must obtain the consent of the County Council.

simplify areas and consolidate authorities. Notably the Education Act of 1902, which abolished the *ad hoc* education authorities known as School Boards, and transferred their duties to the several councils of counties, boroughs, and districts. Should the proposals of the Poor Law Commissioners of 1909 become law, this tendency will be still more strikingly illustrated. Nor can it be doubted that it is in the main healthy and sound. The more varied and important the functions committed to the local governing bodies, the more likely are they to enlist the services of men of position, character, and independence. And on their doing so the future of local government obviously depends. Should they fail to attract such men (and women) the multiplication of responsibilities and the concentration of powers can have only one result: the development of a local bureaucracy and the increased authority of a vast army of local officials. Signs of such a tendency are not lacking even now, and with the aggregation of population in urban areas it is probably inevitable; but it is one which must be carefully watched, for it is foreign to the genius and tradition which have made England pre-eminently the land of vigorous and independent local government.

CHAPTER XIII

LOCAL GOVERNMENT: (2) URBAN

'There hardly can be a history of the English borough, for each borough has its own history.'—F. W. MAITLAND.

'England is becoming more and more a collection of cities, and this has already wrought a marked change in the character and political temperament of her people.'—A. L. LOWELL.

'All tendency on the part of public authorities to stretch their interference and assume a power of any sort which can easily be dispensed with should be watched with unremitting jealousy. Perhaps this is even more important in a democracy than in any other form of political society.'—J. S. MILL.

MORE than three-fourths of the people of England and Wales now dwell in towns. Two centuries ago more than three-fourths were country-folk. According to an estimate of 1696 London and the other cities and market towns contained 1,400,000 people, or 24 per cent. of the whole; the villages and hamlets contained 4,100,000, or 76 per cent. According to the last census (1901) the position is almost exactly reversed. London alone, with its 4,536,063 inhabitants, had a population greater than the whole rural population of England and Wales two centuries before, while the town dwellers numbered in all 25,054,268, or 77 per cent. of the whole; the country folk only 7,471,242.

This is, beyond all comparison, the most portentous symptom of the social and political life of modern England, and it justifies a separate, though necessarily brief, treatment of municipal history and organization. There is historical justification as well. For the towns—cities and boroughs—have almost from the first presented certain

anomalies and exceptions, though in a less degree than the *Communes* of Italy and France, to general rules of local government. Among English towns, again, the position of London has always been exceptional.

Originally the burgh was, as Freeman put it, 'only that part of the district where men lived closer together than before.' But the mere aggregation of population soon gave to the townships thus distinguished a differentiated organization. The aggregation was itself due to one of many causes, or to several in combination. Many towns, like London, sprang up on the tideway of great rivers at a point as remote from the sea as possible; others, like St. Edmunds or St. Albans, found a nucleus in the shrine of a saint whose fame attracted pilgrims; others, like Canterbury or Norwich, grew up under the shadow of a great monastic house; others at the junction of roads or at the fordable point of a river, like Hertford; others were artificially created for strategic reasons. The Danish invasions, in this way, gave an immense impulse to the foundation of towns. Oxford owes its origin to a combination of circumstances: the shrine of a saint (St. Frideswide); a ford across the Thames; a nodal point on the old road system; a border fortress against Danish incursions.

But whatever the motive, religious, economic, or strategic, which brought men together, the mere aggregation necessitated or at least suggested a completer organization than that which sufficed for the rural townships. That organization reflected the amalgamation or conflict of three different elements or ideas: the agricultural, representing the Anglo-Saxon tun or burgh, with its Folkmoot; the feudal, typified by the Court Leet; and the commercial, by the Merchant Guild. These ideas were, to a great extent, successively dominant in the town-life of early England. At first the urban township was differentiated from the rural townships around it only by size and numbers. Like the latter it

might be either independent or (much more often) 'dependent' i. e. in the soke of some lord. Before the Norman Conquest all towns, whether originally 'dependent' or not, had passed either into the 'soke' of a lord or into the demesne of the King. As a rule the organization of the towns assimilated rather to that of the Hundred than of the Township, but (except in the case of London) they were invariably subject to the jurisdiction of the sheriff and the Shire Court.

The great ambition of these incipient municipalities was to obtain independence, fiscal and judicial, from the local authority of the sheriff and the shire.

This they accomplished by slow degrees and in a variety of ways. The most obvious was to obtain from the lord in whose demesne the town lay a recognition of local customs embodied in a written *Charter*. Such a privilege was not of course granted without valuable consideration. The first step was, as a rule, to get immunity from the jurisdiction of local courts and a recognition of the right to hold courts of their own; the second was fiscal independence. This latter was secured in two stages. In the first place, a body of the wealthier inhabitants would compound with the sheriff for the payment of dues; would undertake to 'farm' the borough. In the second, the town would acquire the right of paying this *firma burgi* direct into the exchequer without the interposition of the sheriff. Another stage towards independence was marked by the acquisition of the right of electing their own magistrates, their bailiffs or reeves, or even in a few cases a mayor. London, far ahead of other towns in this as in other ways, got a sheriff of its own under Henry I, a mayor under Richard I, and the right of electing the mayor by the Great Charter of 1215. Thus London gave the lead, but only after long intervals were other towns able to follow it. Another highly prized privilege was the recognition of the

Merchant Guild or Hansa, with its extensive powers for the regulation of trade.

The precise relation of the Merchant Guild to the municipality is a technical and indeed highly controversial question with which we are not concerned.[1] But this much must be said: the Merchant Guild was, in most towns, an exceedingly influential association of traders, who in a corporate capacity did much to stimulate and assist the evolution of municipal independence. But the Guild must not be identified, either in theory or fact, with the *Communa* or municipality. The former was a powerful adjunct to the latter but was not the less distinct from it. As early as the time of Henry I the Merchant Guild was frequently specified as one of the privileges secured to a town by Charter; such was the case with Leicester (1107), with Beverley (1119) and with York (1130). It is definitely proved to have been established under the Angevins in no less than 102 towns—practically in every town of importance outside London. Bishop Stubbs is doubtless right in his assertion that in the twelfth century the possession of a Merchant Guild was 'a sign and token of municipal independence', but neither then nor at any time did it cover the whole field of municipal activity. It was, as Mr. Gross says, a 'very important but only a subsidiary part of municipal administrative machinery', concerning itself primarily with the regulation of trade, owning property which was distinct from municipal property and governed by officials who were not identical with those of the municipality. That there was a tendency, in some cases irresistible, for the two organizations in time to merge is undeniable; but they must not therefore be regarded as substantially and universally identical. As the Merchant Guild tended more and more to absorb the government,

[1] Cf. Gross, *Gild Merchant*; Brentano, *English Guilds*; Ashley, *Economic History*.

the specialized trading interests began to be relegated to the Trade or Craft Guilds. Their functions, however, were unequivocally economic and must not occupy our attention here.

Meanwhile, there developed by slow degrees the modern idea of a municipal 'corporation' 'Incorporation' was sometimes accomplished by statute, but more often by Royal Charter, as it still is. In this way the town became a legal 'person', with the rights appertaining thereto: the right of perpetual succession, of holding land, of using a common seal, of suing and being sued, and of making by-laws. But this legal conception was not fully worked out until the close of the fifteenth century. By that time there were some 200 'boroughs' or towns incorporated by Charter with a defined though not uniform constitution. For herein lies the main difficulty of English municipal history. 'There hardly can be a history of the English borough,' as Maitland pithily phrases it, 'for each borough has its own history.' Bearing this caution in mind we may say broadly that by the end of the fifteenth century the typical municipal constitution had been evolved: 'an elective chief magistrate, with a permanent staff of assistant magistrates and a wider body of representative councillors'—in other words, 'the system of mayor, aldermen, and common council which with many variations in detail was the common type to which the Charter of incorporation gave the full legal status.'[1]

Already, however, a strangely oligarchical tendency had revealed itself. The governing bodies were as a rule self-elected, and in the management of town business the ordinary burgess had little or no part. This tendency became still more strongly marked in the sixteenth and seventeenth centuries. In the creation or restoration of parliamentary boroughs there was an increasing tendency

[1] Stubbs, iii. 585.

to vest the election of members in the 'close corporations'. The later Stuarts attempted to make the practice uniform. Writs of *Quo Warranto* were issued; ancient Town Charters were forfeited or surrendered wholesale, and in the remodelled municipal constitutions the right of electing members to the House of Commons was vested in corporations nominated by the Crown. Some of the old Charters were restored after the Revolution, but not all, and town government became, therefore, as we have already seen, increasingly narrow and oligarchic down to the Municipal Reform Act of 1835.

With the passing of that Act we get for the first time on to really firm ground. By its provisions the municipal constitutions of all boroughs except London and Winchelsea were remodelled on a uniform plan. The governing authority is now a town council consisting of a varying number of members elected for three years by the whole body of ratepayers, men and women. The town council annually elects a mayor, and also elects a body of aldermen who hold office for six years. The number of aldermen thus elected must not exceed one-third of the number of councillors. The main work of the council is discharged in a number of standing committees which, like the council itself, are assisted by a staff of permanent officials of which the chief is a town clerk. Upon this functionary, his public spirit and ability, the administration of municipal affairs very largely depends. The other officials vary in different towns, but among them are generally found a chief engineer, a sanitary officer, a medical officer, an education secretary, a treasurer, and (where the town has a separate police force) a chief constable.[1]

There are now about 350 municipal boroughs in England

[1] President Lowell, a singularly competent observer, 'after studying a number of English cities was led to imagine that the excellence of municipal government was very roughly proportional to the influence of the permanent officials.'

and Wales, but they vary enormously in status, size, and population. Liverpool, for example, had (1901) 723,000 inhabitants; Hedon had 1,020; thirty-one had, at the same date, a population of over 100,000; sixty-six had less than 5,000.[1]

They differ also in status. We may notice, first, the distinction between 'cities' and 'boroughs'. This is merely complimentary—a distinction of name. How has it arisen? It is generally supposed that a city is a borough which contains a cathedral and the seat of a bishop. But there seems to be no legal sanction for this view. Ely and St. David's are 'cities', but neither is a municipal borough. Truro and Wakefield, after the creation of bishoprics with a seat therein, were raised to the rank of cities; but to effect this a Royal Proclamation was required. A similar distinction has been in the same way conferred upon boroughs like Sheffield and Nottingham, which are not episcopal sees. Again, Oxford and Gloucester were distinguished as *civitates* in Domesday, but neither was the seat of a bishopric until the reign of Henry VIII. If we are compelled to generalize, we can hardly go beyond two propositions: (1) that a town (whether 'borough' or not) which is the seat of a bishopric, is entitled to be or to be created a 'city'; (2) that the same power, that of Royal Proclamation, which confers the dignified title upon an episcopalized town, may also confer it upon any other town.

We pass to the surer ground of legal status. Legally municipal boroughs may be distinguished as: (1) Counties of cities or towns; (2) 'County' boroughs; (3) Boroughs with a separate Court of Quarter Sessions; (4) Boroughs which have, and (5) Boroughs which have not, a separate Commission of the Peace; (6) Boroughs which have, and (7) Boroughs which have not, a separate police force.

The first category is purely historic. There are nine-

[1] Ashley, *Local Government*, p. 36.

teen ancient boroughs which have long possessed all the organization of a county and which for certain purposes, notably the administration of justice, are deemed to be separate counties. These are distinguished by possessing a sheriff of their own. Bristol, Chester, Exeter, Norwich, and Oxford are typical of this class.

Sharply to be distinguished from them are the county boroughs, now seventy-four in number, which are the creation of the Act of 1888. 'The same place may be both a county of a city or town, and a county borough; though most county boroughs are not counties of towns; while a few counties of cities or towns, such as Lichfield and Poole, are not county boroughs.'

The Act of 1888 provided that every borough which had or should obtain a population of 50,000[1] should for administrative purposes be treated as a separate county. The council of such a borough is for all practical purposes a county council, while the borough itself is wholly independent financially, administratively, and judicially, of the county or counties in which it lies.

This is perhaps the least inappropriate place to speak of one town, which is, as it always has been, unique among English cities. London, as regards the square mile of the 'City', shares with Winchelsea the distinction of having escaped the hand of the reformer in 1835. London outside the City was, down to 1888, merely an aggregate of parishes governed like the tiniest country parishes by their vestries, but subject, in certain matters, to the control of a central authority known as the Metropolitan Board of Works. The Local Government Act of 1888 abolished the Board of Works and transformed extra-city London into an administrative county under a county council. Upon this council were conferred powers similar to those of other county councils but enlarged and adapted to the

[1] And for historical or other special reasons a few others.

more complex conditions of urban life. A later Act of 1899 transformed the vestries into metropolitan boroughs, of which there are twenty-eight, each with its mayor, aldermen, and councillors like any provincial borough, but with less financial independence, being controlled on the one hand by the Local Government Board, on the other by the London County Council.

The brand-new bodies brought into being by the Acts of 1888 and 1899 have wrought a marvellous change in the Metropolis, alike in outward visible form and in administrative symmetry. The County Council has been the object of much criticism; the local boroughs of some ridicule; but both are what Londoners make them and neither ridicule nor criticism has done harm.

By the reforms of 1888 and 1899, as by that of 1835, the historic 'City' of London was untouched; it has been often threatened but it is not now likely to encounter perils so great as those it has survived. For many centuries London afforded the model to which other cities were always striving to attain. Already by the time of the Norman Conquest it had acquired the organization of a shire. It got its *Communa* with a mayor and a small body of aldermen in 1191, and the right of electing the mayor perhaps as early as 1193.[1] At this time the Corporation consisted of a mayor, twenty-four aldermen of the wards, and two sheriffs. Before the close of the century, elected common councillors had come into being to assist the aldermen in their several wards. Superimposed upon or rather intermingled with the municipal organization or *Communa* was that of the Merchant and Craft Guilds. From them come the liverymen of the Companies. Before the accession of the Tudors the constitution was finally defined, and the formal 'incorporation' of the City completed. The mayor, sheriffs, and parliamentary burgesses were to be

[1] On this difficult subject cf. Round, *Commune of London*, and Beaven, *Aldermen of London*.

elected by the liverymen and the common council; the aldermen were to be elected for life, one for each of the several wards. This constitution has subsisted, unchanged in essentials, from that day to this.

Boroughs with a separate Court of Quarter Sessions belong for certain administrative purposes to the county, but for most judicial purposes are independent of it. They are distinguished by the possession of a Recorder, who is the Judge of the Court of Quarter Sessions, and a Clerk of the Peace, and, as a rule, by the right to elect their own coroners. The Recorder is a professional barrister appointed by the Crown. The post is eagerly sought after. It is not highly remunerated, but it does not disqualify, like other judgeships, for practice at the Bar, nor (except for the particular borough) for a seat in Parliament. Moreover, it is often a stepping-stone, unlike County Court judgeships and police magistracies, to further legal promotion. A separate Commission of the Peace, or magistracy, and a separate police force are merely matters of administrative convenience which do not greatly affect the status of the boroughs nor demand further explanation.

The powers and functions of municipal authorities are immensely wide, and constantly increasing. Generally speaking they may be said to be responsible for public order, for health, for education. But few boroughs, especially large boroughs, are content with the performance of these elementary duties. They may acquire further powers in three ways: (*a*) by 'adopting' one or more of the innumerable 'permissive' Acts already on the Statute-book; (*b*) by obtaining special 'Private Acts'; or (*c*) by obtaining from the Local Government Board 'Provisional Orders.'[1] In one or other of these ways they may be authorized to provide water, gas, electricity, markets, cemeteries, gymnasiums, housing accommodation, baths and wash-houses, tramways, public libraries, parks, bands, museums,

[1] See *supra*, p. 233.

golf links and many other amenities, conveniences, and necessaries of modern social life.

How far public authorities ought to undertake these and similar enterprises is one of the most highly disputable questions with which the modern citizen is confronted. Nor can it be dogmatically answered. But it is too important to be ignored, and one or two considerations may, therefore, be suggested.

In the first place a distinction may be drawn between necessaries and conveniences, and another between services and commodities. Water, for example, is a necessary; the supply of it is limited, but apart from the initial enterprise of obtaining an abundant and pure supply, no great skill is demanded in the provision of it. In cases where private enterprise has procured such a supply—good, abundant, and cheap—there is no pressing reason why a municipality should desire to acquire it: but equally there is no special reason against it. If the private supply is impure, insufficient, or expensive, a municipality is bound to intervene and obtain a monopoly. For obvious reasons there cannot, in an ordinary town, be two competing water systems. Similarly in regard to drainage. This also is a matter of public health, and any system must be universal. No sane person would wish to revert to an individualistic scheme of drainage. Artificial light is almost as much a necessity as water; should the supply of it also be, therefore, a municipal monopoly? Here a distinction creeps in. Every citizen requires water; but not every citizen requires, for private consumption, gas. He may prefer another illuminant: electric light, oil, or candles. If, however, the municipality owns and manages the gas works, he may have to wait for some time before he is permitted to obtain electric light. This apprehension has a basis of proved fact. Parks and open spaces may fairly be deemed necessities to public health; museums and free libraries

desirable if not indispensable adjuncts to public education; but between these and municipal golf links there seems to be a distinction. Amusement and exercise may be as indispensable as open spaces; but is it the business of the public authority to supply them?

It seems desirable, at this point, to set forth as briefly and dispassionately as possible the arguments which are urged for and against the extension of municipal activities and responsibilities; for and against what is popularly known as 'municipal trading'.

On behalf of municipal trading it is urged (1) that certain fields of commerce are virtually monopolies, and that monopolies with their vast potential profits ought not to be vested in individuals or private syndicates or associations; (2) that in matters which though not monopolistic are still of great and general importance to the health or well-being or convenience of the community, the municipality, as representing the community, should intervene to mitigate the 'greed' of the private trader and should, by underselling him, cheapen the commodity to the consumer: the provision of means of transport, of working-class dwellings, &c., may be held to come under this category; (3) that it is the duty of public authorities to improve in every possible way the conditions of manual labour, to act as a 'model employer', to employ labour always under model conditions, to pay the union rate of wages, and so forth; and (4) that since public authorities can raise capital on more advantageous terms than private traders, it is an actual economic disadvantage to leave large enterprises in private hands.

These arguments clearly demand serious consideration: but this is not the place for exhaustive discussion; a few words must suffice. (1) As to monopolies. The number of these, when closely scrutinized, is far less than is commonly supposed. Real monopolies may be safely left to municipalities; but how many are there? No town could

tolerate more than one gas supply; it is sufficiently monopolistic to justify and require that the conditions under which it is supplied to the public—its quality, price, and so forth—should be under the closest public scrutiny; but it is at least a matter for argument whether the public authority is not better occupied in controlling the purveyors than in directly manufacturing and distributing the commodity. Similarly in regard to means of public locomotion, involving, like tramcars (but not motor omnibuses) the concession of a virtual monopoly. (2) In regard to the supply of necessaries which are not monopolies. Is it the duty of the public authority to intervene between the greed of the private capitalist or trader and the well-being of the community? It is difficult to give any general answer to this question, other than to say that it must depend on circumstances. Take the case of working-class dwellings. An enterprising municipality is invariably confronted by this dilemma. The provision of such dwellings is either a remunerative investment or it is not. If it is, it is quite certain that it will be undertaken by private 'speculators', and it is highly probable that if the profits are excessive, they will be reduced to a fair level by competition. There may be exceptional cases in which these conditions are temporarily or even permanently not fulfilled. In such cases no one would demur to the enterprise of the municipality. But it may be that the investment is commercially unremunerative; that the provision of such dwellings does not 'pay'. What under these circumstances is the duty of a public authority? If it houses the workmen at unremunerative rates it is clearly providing exceptional advantages for one class at the expense of another. Does it not do the same in the case of education? And if it may provide education for the young, why not housing both for the children and their parents? It may be answered that it educates the children not in their interests, but in those of

the community. And, moreover, the provision of education is universal. It is open to all. Cook's son and duke's son may (as in America, and formerly not seldom in Scotland) equally participate. Housing schemes are in practice partial. But if the supply of municipal houses is strictly limited, how are the privileged tenants to be selected? Who are to be housed at the expense of the ratepayers at large? If, on the contrary, the scheme is on a large scale, the elected municipality will become the landlords of a large body of its constituents. The situation thus created would not be free from difficulty. If the relation is on a purely commercial basis, if the houses are let at rack rents, little harm will be done; but also little good. If they are let at anything less than the commercial rent, a body of privileged tenants is necessarily created. And that way danger lurks. (3) But if there is danger to purity of municipal government in the existence of a body of municipal tenants, is there none in the existence of municipal employés? The provision of services, still more the production and distribution of commodities, necessarily involves the employment of labour. There are said to be at the present time more than 2,000,000 people in the employment of local authorities, and in some places they amount to from 5 to 8 per cent. of the municipal voters. It is unnecessary to enlarge upon the menace to purity, or efficiency, or both, which this state of things may involve. In the colony of Victoria, one of the most democratic communities in the world, it has been decided to create special constituencies for the employés of state railways. This is an ingenious compromise. There are those in England who would like to extend the scope of municipal activities, but who hesitate to do so because they see the danger involved in the creation of large bodies of municipal employés who are practically the masters of their employers. To disfranchise them is felt to be an extreme, though it may

prove to be a desirable step. Victoria is trying the interesting experiment of withdrawing such voters—or some of them—from the ordinary constituencies, but giving them constituencies of their own. It will be closely watched by all social and political observers.

There remains to be considered the purely economic argument; that (4) it is an actual economic disadvantage to leave large enterprises in private hands when public authorities can raise capital on more advantageous terms than private traders. That for certain purposes they can do so is undeniable. But two questions demand an answer. Is it certain that this advantage will be maintained? As long as local authorities confine themselves to enterprises which old-fashioned people regard as 'legitimate', it is probable that it will. The security is clearly superior to that which any individual can offer. But if the municipalities embark on speculative enterprises, if they take the risks which are incidental to private trade, however conservative its conduct, will they retain their advantage in the money market? At present they have an advantage of about 1 per cent. or less. A first-class industrial concern can borrow on debentures at about 4 to 4¼ per cent. Birmingham, Liverpool, and Manchester have to pay about 3½ per cent. But there is another question. Assuming that capital can be borrowed to this extent cheaper, will it be employed to equal advantage? Capital charges are no doubt a serious item in any large undertaking, but they are trifling as compared with the wages bill. Increased cost of labour or management on the one hand, deficiency of output on the other, will very quickly counterbalance any advantage secured from cheapness of capital. And no one contends that municipal management, however efficient, has yet proved itself to be economical.

The facts, however satisfactory the explanation may be, are in themselves indisputable. The liabilities of local

authorities in England and Wales in 1875 stood, in round figures, at £92,820,000; in 1905 they were £482,984,000. The increase in thirty years was 369 per cent. Nor has there been any corresponding increase either in population or in rateable value. The population (in 1871) was 22,905,000; thirty years later it was 32,526,075. The debt per head was in the earlier year £4 per head of population; in the later, £15. In the earlier it was about 16*s.* per £1 of rateable value; in 1905 it was about 44*s.* But these figures, though impressive, are not conclusive.

It is contended that these vast liabilities are represented by corresponding assets, that the capital expenditure has been to a great extent upon remunerative undertakings. It is not easy to test the accuracy of this contention, nor to measure its force. Hostile critics cast a good deal of suspicion upon the methods of municipal book-keeping, and suggest that the application of a commercial audit would reveal the fact that these 'remunerative' enterprises are actually conducted at a loss. The point is too technical for more than a passing reference in these pages; but one test may perhaps be suggested. If these municipal enterprises are really remunerative, the benefits ought to be perceptible in a diminution of annual expenditure. But of this there is no indication. On the contrary: the rates raised in 1875 amounted to £19,000,000 or 3*s.* 3¾*d.* in the £ of valuation, or 16*s.* 2*d.* per head of population. In 1905 they amounted to £58,000,000 or 6*s.* 1¼*d.* in the £, or 34*s.* 1*d.* per head of population. These facts, so far as they go, speak for themselves. But though indisputable they do not close the argument. We may be getting good value for the money spent; capital expenditure may be remunerative in the larger, if not in the narrower sense; expenditure may be justified by the increased intelligence and longevity, the enhanced economic efficiency, and the improved moral and physical condition of the great masses of our urban populations.

Two things, however, may be demanded of those who advocate the extension of municipal activities: they must show, first, that this increase, enhancement, and improvement has actually taken place; and, secondly, that it has not been purchased at too high a price, not in the economic, but in the moral and political sense. These things are not easily measured; proved or disproved. That there has been improvement along certain lines no one with a discerning eye and an understanding heart can question. Does the balance incline that way? Or do the more subtle disadvantages outweigh the more palpable benefits? It is men, not officials, who make the greatness of states; not machinery, however perfect, but the personal initiative of individuals. That was a lesson which John Stuart Mill, socialist though he confessed himself to be, was never weary of enforcing:

> 'The worth of a State,' he wrote, 'in the long run, is the worth of the individuals composing it; and a State which postpones the interests of their mental expansion and elevation to a little more of administrative skill, or of that semblance of it which practice gives in the details of business; a State which dwarfs its men, in order that they may be more docile instruments in its hands, even for beneficial purposes—will find that with small men no great thing can really be accomplished, and that the perfection of machinery to which it has sacrificed everything will in the end avail it nothing, for want of the vital power which, in order that the machine might work more smoothly, it has preferred to banish.'[1]

One point remains to be noticed. We have now described the organization of the Central and of the Local Government. What, if any, is the nature of the connexion between them? Incidentally we have touched it at many points, but it needs to be described more explicitly.

For there are two features of recent political development in England which are at first sight contradictory. On the

[1] *On Liberty*, p. 172.

one hand we have seen the enormous progress made in local administration—its systematization, its extension, and the multiplication of its activities. But coincidentally with this we have to note the increasing interference of the central government in local affairs; the expansion of the work of the Local Government Board, of the Home Office and the Board of Trade, and the creation of a small standing army of inspectors, entrusted primarily with the duty of seeing that the rules of the central authority are carried out by the several local authorities: Poor Law inspectors; school inspectors; factory inspectors; inspectors of mines, of fisheries, of workhouses, and of what not. The reformed Poor Law of 1834 provided the new model. The widely divergent principles, on which, prior to 1834, the Poor Law was administered in different localities, suggested the advisability of a central Poor Law Board to secure some semblance of uniformity, and to maintain a standard of efficiency. The Poor Law Board developed into the Local Government Board. But the example it set was extensively followed; at the Home Office, for example, in regard to factories, mines, and prisons; at the Board of Trade, in regard to lighthouses, fisheries, and much else; at the Board of Education, in regard to schools.

But although in all these matters the hand of the central government is increasingly felt, and the work of inspection is close and efficient, the greater local governing bodies are subjected to curiously little restraint. This is, no doubt, in harmony with the genius and tradition of our people. 'We have in England,' says Mr. Percy Ashley, 'traditional ideas as to the autonomy of local communities which are the outcome of our political and constitutional history.' In England, as we have seen, the central government is the child of local government; in France and Prussia, on the contrary, it is the parent. This is a great and essential difference which has left a profound and permanent impress

upon our institutions, and still more upon the spirit of our administration. 'The influence of the historical tradition is so strong that the English citizen probably still has some conception of local government as a right with which no central power may properly interfere.'[1]

Nevertheless, the local authorities are by no means free to go as they please; to do or leave undone as they will. The central government is alert both to restrain and to stimulate. The control of the central over the local government is threefold—judicial, legislative, and administrative. Local authorities are in no real sense autonomous; if they exceed their powers or neglect their duties, they may find themselves in conflict with the law, with Parliament, or with one or more central administrative departments.

The responsibility of officials to the law is, as we have seen, a characteristic feature of English public life. It is a result of the absence of that system of 'administrative law' which gives to the executive of so many other countries peculiar privilege and authority. In England all local officials are amenable to the ordinary law of the land, and for any violation of the law must answer before the ordinary tribunals. But this is a responsibility which they share with the officials of the central government, from the Prime Minister and the Lord Chancellor downwards.

The control of Parliament over local bodies is exercised by legislation of four different kinds[2]: (1) *Constituent Acts*, which 'create the various classes of local government authorities and arm them with the powers necessary for the fulfilment of the duties intended to be discharged by them'. Such were the Local Government Acts of 1888 and 1894, already described. (2) *General Acts*, giving power to local authorities generally to deal with a specific

[1] Ashley, *Local Government*, p. 4.

[2] I follow here the categories of and quote freely from Mr. Percy Ashley's admirable chapter on the subject in *Local Government*, c. ix. § 2.

subject, such as public health or education. (3) *Adoptive Acts.* To this device, a very favourite one with the English Parliament, I have already incidentally referred. An 'adoptive' Act is a permissive measure which local authorities may adopt or not, as they choose. A familiar instance of such legislation is the Public Libraries Act of 1892. As a rule such Acts can be adopted only after a *referendum*, or direct poll of the ratepayers. The method has its advantages and its dangers. It gives opportunities for the trial of experiments; it stimulates, by the *referendum*, interest in local affairs, but it tends to penalize financially the more progressive localities. Adoption on a large scale generally means high rates; high rates mean high rents, and high rents accentuate the housing problem. (4) *Private Acts*, the method and operation of which I have already described.

Provisional Orders represent, as we have seen, a halfway house between legislative and administrative control over local authorities. They must be obtained through a Department, but sanctioned by Parliament. If unopposed they afford a decidedly cheaper method than private bill legislation, and a less precarious one. But the conditions—especially the financial conditions—imposed by a Department are not infrequently more exacting than those imposed by a Select Committee, and some local authorities prefer on that account the more elaborate and more immediately expensive method.

Is the control exercised by the central over the local government adequate? The question is not an easy one, and will be variously answered. There are on the one hand those who, for reasons already adumbrated, resent any interference on the part of the central government with the governing bodies of important localities. The inhabitants, for example, of Manchester, Liverpool, and Birmingham think, and with some reason, that they are at least as competent to manage local affairs as any Government Depart-

ment in London. On the other hand, there are those who would like to see some more effective check than at present exists upon the spending and borrowing proclivities of ambitious local authorities. Even now, no loan can be raised without the sanction either of Parliament or of the Local Government Board. The latter control is the more effective, since the Board satisfies itself that proper provision is made for repayment. But many contend that even this is inadequate and that nothing short of a regular audit, at the hands of an officer of the central Department, will secure effective control over the vagaries of local accountancy.

But the difficulty really goes deeper. There is a divorce already serious between local representation and local taxation. Rates are in too many cases half concealed by rents, owing to the fact that the rates are paid by the landlord and not the tenant. In Birmingham, for example, it was estimated by the town clerk that from 70 to 75 per cent. of the inhabitants were 'compound householders', i. e. lived in houses on which the landlord paid the rates. In London nearly half the municipal voters are not direct ratepayers. In West Ham, out of 48,000 assessments, only 14,000 are directly rated. This is a serious danger, and one which, even at the expense of some administrative inconvenience, ought not to be allowed to continue.[1] But if there are many municipal electors who feel no direct responsibility for the financial policy of their representatives, so there is much ratepaying property which is unrepresented. This is due to the development of joint-stock companies. There are, for example, some parishes in which almost the whole of the rates are paid by a single railway company. The London and North-Western Company is said to pay £600,000 a year in rates, and has no representative whatever on any of the bodies to which they are paid. In

[1] It is one of the many excellent rules of the Co-operative Tenants Society that every tenant shall pay his rates directly.

Manchester and Liverpool practically one-third of the rateable hereditaments are in the hands of corporations or companies without a vote between them.[1] There are, therefore, at least three dangers to which municipal government in England is, at present, exposed: the multiplication of municipal activities may bring about an undesirable correspondence between candidate and elector on the one hand and employer and employed on the other; the extension of joint-stock enterprise may widen the divorce between local taxation and representation; and, finally, an excessive demand upon unpaid services may disgust the elected local administrator and throw increased responsibility and power into the hands of the local bureaucracy. To the seriousness and reality of these dangers no truly progressive citizen can be blind.

But all these things notwithstanding, it is consolatory to find that so competent and impartial an observer as President Lowell is able to give a very fair testimonial to the purity and efficiency of English local government. It is disquieting to learn that in his view the personnel of the representative local bodies shows signs of deterioration, even though he appears to find more than counterbalancing advantage in the improvement of the permanent officials. That the officials are increasingly efficient may be admitted; but no one who is imbued with the genius of English local government would regard this as a satisfactory set-off against a deterioration in the quality of the elected representatives on local governing bodies. On this point it is difficult to reach a conclusion; but if it be true, no countervailing improvement in mere administrative efficiency will long retard the decay of those local institutions which for centuries have formed the nursery of political liberty in England.

[1] Avebury, *Municipal and National Trading*, c. x.

CHAPTER XIV

THE JUDICIARY: THE COURTS OF LAW AND THE LIBERTY OF THE SUBJECT

'There is no liberty if the Judicial power be not separated from the Legislative and the Executive.'—MONTESQUIEU.

'It is for this end that the King has been created and elected, that he may do justice to all.'—BRACTON.

'No free man shall be taken or imprisoned or disseised or outlawed or exiled or anyways destroyed; nor will we go upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land. To none will we sell, to none will we deny or delay, right or justice.'—*Magna Carta*, §§ 39, 40.

'That after the limitations shall take effect as aforesaid, judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them.'—*Act of Settlement*, § 7, A. D. 1700.

'The standard of good behaviour for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a Monarchy it is an excellent barrier to the despotism of the prince; in a Republic it is a no less excellent barrier to the encroachments and oppressions of the legislative body.'—HAMILTON, in the *Federalist*.

WE have now completed our survey of the position of the Legislature and the Executive; we have analysed the structure of their several parts, and have described the process by which laws are made and the means employed to put them into execution.

It remains to treat of the third great department of governmental activity, the judiciary; to examine the

machinery for the interpretation of law, and the administration of justice.

Of all the functions of government this is of most immediate interest to the individual citizen. It matters not how elaborate the machinery of legislation may be; how scientific the product; how perfect the methods of execution; the life of the individual citizen may nevertheless be rendered miserable; his person and his property will be alike insecure if there be any defect or delay in the administration of justice, or any ambiguity in the interpretation of law.

We have already seen that of the salient features of the English Constitution one of the most characteristic is the rule of law; the assurance that in England no man can be deprived of liberty or of goods, can be mulcted in person or property except for a distinct breach of the law proved before one of the ordinary tribunals. Not less far reaching is the rule that in England no man is above the ordinary law, and that for any breach of it, however exalted the position of the offender, reparation may be obtained. This, to a constitutional lawyer, is the real meaning of the assertion, constantly reiterated, that in England Ministers are 'responsible'. Strictly speaking, as Maitland clearly points out, 'Ministers are not responsible to Parliament; neither House, nor the two Houses together, has any legal power to dismiss one of the King's Ministers. But in all strictness the Ministers are responsible before the Courts of Law, and before the ordinary Courts of Law, and they are there responsible even for the highest acts of state; for those acts of state they can be sued or prosecuted, and the High Court of Justice will have to decide whether they are legal or no.[1]

This is the obverse of the first 'rule of law'. These two complementary rules provide the foundations upon which the whole magnificent fabric of personal liberty has in this country been erected. This point has perhaps

[1] *Const. Hist.* p. 484.

been sufficiently illustrated already. One question, however, remains to be answered: how has this result been secured, and how is it maintained?

It has generally been held by political philosophers that there is no more conclusive proof of the backward or advanced condition of any political society than the relations of the Legislature, the Executive, and the Judiciary. In primitive societies there is no 'separation of powers', no differentiation of functions. The despotic ruler or chief is law-maker, interpreter, and administrator in one. It is a distinct symptom of an advance from a lower to a higher stage in the evolution of the political organism when the judicial function is differentiated from those of the Legislature and the Executive.

In England the differentiation is virtually complete. In the sixteenth century, thanks to the multiplication of 'prerogative courts', such as those of the Star Chamber, the Court of the Marches, the Council of the North, and the Stannary Courts in Cornwall, the Executive was able to exercise a considerable degree of practical control over the administration of justice. There is no evidence that these prerogative courts were during that period unpopular. On the contrary, men resorted to them freely, for there they got justice, which, if rough, was prompt and comparatively cheap. It was an entirely different matter under the Stuarts. What had seemed under their predecessors to be an appropriate element of dictatorial machinery stood out as an oppressive engine of despotism. Encouraged by the great authority of Bacon, the first two Stuart kings endeavoured to subordinate the Judiciary to the Executive. 'Encroach not,' said James I to the iudges, 'upon the prerogative of the Crown; if there falls out a question that concerns my prerogative or mystery of State, deal not with it till you consult with the King or his Council, or both; for they are transcendant matters. That which concerns the mystery of the King's power is not

lawful to be disputed.'[1] Bacon's language points not less clearly in the same direction: 'It is a happy thing in a State when Kings and States do often consult with judges; and again when judges do often consult with the King and State: the one when there is matter of law intervenient in business of state; the other when there is some consideration of state intervenient in matter of law. . . . Let judges also remember that Solomon's throne was supported by lions on both sides; let them be lions, but yet lions under the throne, being circumspect, that they do not check or oppose any points of sovereignty.'[2] The meaning is unmistakable: the judges were to become the handmaids of the Executive; the principle familiar to-day in many countries that administrative acts are to be judged by administrative law was to be imported into English jurisprudence. The judges were naturally not slow to take hints coming from quarters so influential. The decision in Bate's[3] case may have been due to a real ambiguity in the law; but it is difficult to resist a suspicion that both in Darnel's case and in Hampden's the decision of the Court was tinged by a regard for the underlying principle of administrative law. The convenience of the Executive, or perhaps we should say the necessities of the State, were considerations not remote from the decision which violated the principle of *Habeas Corpus* and from that which legalized ship-money.

The issue thus joined was one of the highest moment. If the Judiciary was to be subordinated to the Executive, the most effective of all safeguards for individual liberty was gone. The abolition of the Prerogative Courts by the Long Parliament (1641); the passing of an Act declaring ship-money illegal (August 7, 1641); the confirmation of the principle of *Habeas corpus* by the Act of 1679: these did much. But no final and adequate remedy was reached

[1] Speech in the Star Chamber, 20 June, 1616.

[2] *Essays*: 'of Judicature.'

[3] *supra*, p. 199.

until the Act of Settlement gave to the judges a tenure conditional only on good behaviour and made them immovable save by an address to both Houses of Parliament.

Thus the Judiciary in England was rendered entirely independent of the Executive. It is also entirely distinct from the Legislature. It is true, as we have seen, that the House of Lords possesses the supreme appellate jurisdiction. But the exercise of that function is totally distinct from its ordinary function of legislation. In fact, if not in theory, the personnel of the Lords as a Court of Justice is clearly distinguished from its personnel as a branch of the Legislature; but that is a point on which it would not be safe to insist. It is enough to say that for all practical purposes the Judiciary is distinct from and independent of the Legislature.

Nevertheless, in two ways the Legislature continues to assert its sovereignty over all persons and in all causes. It can effect the removal of any individual judge for misconduct; and it can, by an amendment of the law, virtually override the decision of the Courts. And this is not infrequently done. The enactment of the Trades Disputes Bill in 1906 was a direct result of the famous judicial decision in the Taff Vale case. It did not, of course, technically reverse that decision; but by an amendment of the law it rendered a repetition of that judgement impossible in the future. Thus the Judiciary in England, though distinct from the Legislature, is in the last resort inferior to it.

In the United States of America it is otherwise, and in order to emphasize the contrast it is worth while to examine the position of the Judiciary in that country. The difference between its position in America and its position in Great Britain is, of course, due to the fundamental difference between a federal and a unitary Constitution. In a federal Constitution it is essential not only that the Constitution should be above the law, or at least above the ordinary law, but also that authority should be given to the Courts to act

as interpreters of the Constitution. In England the judges are never called upon to interpret the Constitution, they have only to interpret the law. In America, on the contrary, they are required to determine the legality of the law itself. An English Court may hold the opinion that in enacting a particular law the Legislature acted with conspicuous folly. But any such opinion they must keep to themselves; it is no part of their business to express it, still less to act upon it. Least of all are they called upon to decide whether the Legislature was legally competent to enact it. No such question can, with us, possibly arise, for the simple reason that in England there are no limits to the legal competence of Parliament.

In America, on the other hand, the judges are constantly called upon not merely to *interpret* a given law, but to decide whether the law is law; that is, whether the Legislature in enacting it acted within the limits of the power assigned to it by the Constitution. In other words, the judges are actually guardians of the Constitution itself.

In order that they might perform a function so peculiar and responsible, a special position was assigned to them by the Constitution. Under Article III their position is made clearly co-ordinate with that of the Executive (the President) and Congress. The Judges of the Supreme Court occupy an exceptionally strong position; they are appointed for life by the President, with the approval of the Senate, and are removable only by the elaborate process of impeachment. The action of the founders of the Constitution was deliberate. They 'affirmed the life tenure by an unanimous vote in the convention of 1787, because they deemed the risk of the continuance in office of an incompetent judge a less evil than the subserviency of all judges to the Legislature. . . . The result,' adds Mr. Bryce, 'has justified their expectations.'[1]

In order to emphasize a contrast I have described the

[1] *American Commonwealth*, i. 227.

Judges of the Supreme Court in America as 'guardians of the Constitution'. To this description a purist might take exception, and it is essential, therefore, to explain with precision the sense in which this function can be attributed to them.

The Court never presumes to act in this capacity on its own initiative; it can do so only when in the ordinary course a case is brought before it. 'The Court,' says Mr. Eaton Drone, 'has authority to expound the Constitution only in cases presented to it for adjudication. Its judges may see the President usurping powers that do not belong to him, Congress exercising functions it is forbidden to exercise, a State asserting rights denied to it. The Court has no authority to interfere until its office is invoked in a case submitted to it in the manner prescribed by law.'[1] In other words the function of the Court is purely judicial. Mr. Bryce, therefore, is clearly right in affirming that the duty of American judges 'is as strictly confined to the interpretation of laws cited to them as it is in England or France'. Such a statement, however, if it stood alone would give an erroneous impression of the position of the American Judiciary. Mr. Bryce himself supplies the necessary corrective by pointing out that whereas in England there is only one law for the judges to interpret, or rather that all laws are of equal validity, in America there are four different kinds of law possessing varying degrees of authority. Stated in order of authority they are: (1) the Federal Constitution; (2) Federal Statutes; (3) State Constitutions; and (4) State Statutes. Of these the first prevails against all the rest. Technically, therefore, the function of the judges is to interpret the law of the Constitution. But on that interpretation depends the question as to the validity of other laws. 'The only question they have to consider,' says Mr. Eaton Drone, 'is whether the power in dispute is granted

[1] *Forum*, February, 1890.

or withheld by the Constitution. It is not for them to say whether the grant or the denial is a defect in the Constitution. . . . The judges may regard the law under consideration as highly beneficial. If they think it contrary to the Constitution they must declare it void. They may look upon it as mischievous, tyrannical, or dangerous. If they find it warranted by the Constitution they are bound to pronounce it valid. They are not to consider whether the effect of their decision will be to annul a good law, or to uphold a bad one. That is the theory of the judicial function.'[1]

Nevertheless, desirable though it has seemed to define that function strictly, it remains true that in effect the judges act as guardians of the Constitution against the possible assaults of the Executive or the Legislature. It is just conceivably possible that a law which was enacted in contravention of the Constitution might remain law, provided that no question as to its legality was ever raised before the Courts. But such a contingency would mean the assent or acquiescence of every individual citizen of the United States, and is too remote for serious consideration.

The broad contrast which I was anxious to elucidate remains therefore true: in England the judges can under no circumstances entertain the question as to the competence of the Legislature to enact a given law. If it is on the Statute-book it is binding on them until it is amended or repealed. In America the judges are constantly compelled to entertain this question; they must ask not merely whether the law is on the Statute-book, but whether it has a right to be there. The distinction is fundamental. It is true that in both cases the Court is performing a judicial function; that in both cases it is interpreting law; but in England it has only one law to interpret, in America it must have two and may have four.

Having thus, it is hoped, made clear the general position

[1] *Forum*, p. 657.

of the Judiciary in England, its relation on the one side to the Executive and on the other to the Legislature, we may proceed to describe the actual machinery by which the law is administered. The task is rendered the more easy since the machinery was completely overhauled in 1873–94.

The Courts may be divided into two categories: (1) the Central or 'Superior' Courts located (with exceptions to be noted presently) in London; and (2) the 'Local' or 'Inferior' Courts scattered throughout the country. They may further be subdivided into *civil* and *criminal*: Courts which are concerned with rights of citizens *inter se*, in other words with *private law*, and Courts which are concerned with offences against the Crown, as representing the State, in other words with *crime*,—a breach of *public law*.

We deal first with procedure in *criminal* cases, and trace it from the lowest to the highest rung of the judicial ladder.

Offences against the Criminal Law are of two kinds: indictable, the more serious, and non-indictable. An 'indictment' is technically an accusation preferred by a Grand Jury of presentment, a jury, that is, of magistrates not less than twelve nor more than twenty-three in number. The vast proportion of 'criminal' offences are now of a petty character and are dealt with 'summarily' by a Court consisting of a magistrate or magistrates—i. e. Justices of the Peace. These magistrates are appointed by the Lord Chancellor[1]; in counties, the chairmen of county and district councils are *ex-officio* magistrates; in boroughs the mayor, and, for one year after vacating office, the ex-mayor. The history of these important functionaries was sketched in a previous chapter. They still administer justice in two Courts—'Petty Sessions', which meet frequently—in the large towns daily—and 'Quarter Sessions', which are held four times a year.

[1] Usually on the recommendation of the Lord Lieutenant. A Royal Commission appointed to consider the mode of appointment reported in 1910, but no substantial change is recommended.

In the larger boroughs the lay magistrates are 'assisted' — in practice superseded — by a professional barrister appointed by the Home Secretary, and known as a 'Stipendiary Magistrate'; in boroughs which have a separate Court of Quarter Sessions they are presided over by a 'Recorder'. A 'Stipendiary' is invested with the powers of two ordinary justices and may consequently sit alone. But otherwise the procedure is the same. All persons accused of crime are now brought, in the first instance, before a magistrate. If the offence is trivial it is disposed of 'summarily' without a jury, and the accused, if convicted, is sentenced at once. Such sentences must not exceed six months' imprisonment. Some 'indictable' offences may, at the option of the accused be dealt with summarily, but the gravest must be 'sent for trial' to the Quarter Sessions or the Assizes. Quarter Sessions are competent to try all but the gravest offences—murder, treason, forgery, &c.—either with or without a jury. An appeal in certain cases may lie from Petty to Quarter Sessions, and from both to the High Court of Justice.

Offences of the most serious character must go for trial to the High Court of Justice, either in London, or at Assizes.

For the purpose of holding Sessions of the High Court in different localities, England and Wales are divided up into seven circuits. On each circuit there are three Assizes a year; in Manchester, Leeds, and Liverpool there are four. To each circuit one or sometimes two judges are assigned to try criminal, and, where necessary, civil cases as well. In all criminal cases a 'true Bill' must first be found by a Grand Jury before an accused person can be put on his trial, while the question of guilt or innocence is subsequently decided by a petty jury of twelve persons whose verdict must be unanimous.

Whether the trial takes place before a judge on circuit or in London the procedure is the same. Until 1907 there

was strictly speaking no appeal in criminal cases; but in that year a Court of Criminal Appeal consisting of two or more judges of the High Court was established.[1] A convicted prisoner may now appeal on a question of law; or, by leave of the Court of Criminal Appeal or of the judge who originally tried the case he may appeal on a question of fact or mixed law and fact. The Crown's prerogative of pardon, as exercised by the Home Secretary, remains in theory unaffected; in practice many cases which were formerly reviewed at the Home Office now come before the Court of Criminal Appeal.

We turn to the administration of Civil justice.

The Civil Court to which there is easiest access is the 'County Court'. These 'County Courts' are brand-new tribunals created under an Act of 1846, and must be carefully distinguished, therefore, from the historic Courts of the Shire or County, with which they have no sort of connexion. For County Court purposes England is divided into some five hundred districts, in each of which a Court is generally held every month. The districts are grouped into circuits, to each of which a judge is appointed by the Lord Chancellor. There are about fifty such judges, and each judge, therefore, is responsible on an average for ten districts. They sit with (or, almost invariably, without) a jury, and are competent to try cases which involve claims of less than £100. These Courts are exceedingly popular, for in them justice is promptly, efficiently, and cheaply administered. A recent statute (1905) has considerably enlarged their jurisdiction, and there is in some quarters a desire to see it still further extended, e. g. to the decision of divorce cases. A plaintiff may, as a rule, elect whether he will proceed in the County or the High Court, but if

[1] The Home Secretary's power of revision amounted to something like an appeal on questions of fact; while the Court for Crown Cases reserved could quash a conviction if a point of law reserved at the trial was decided in favour of the prisoner.

the action is one which could legally be tried in the inferior Court, resort to the High Court is, by the rules as to costs, discouraged. In nearly all cases an appeal from the County to the High Court is allowed on questions of law, an appeal which may be carried stage by stage to the House of Lords. But having regard to the number of cases tried in County Courts appeals are comparatively rare—a striking testimony to the satisfaction which is given to suitors by these Courts.

Apart from the County Courts there still survive a few of the many local Courts with limited or local civil jurisdiction, such as the Chancery Court of the Duchy of Lancaster; but these are exceptions which must not detain us. The Courts of Common Pleas at Durham and Lancaster have recently been absorbed by the King's Bench Division.

It is in regard to the superior Civil Courts that the simplification effected during the last quarter of the nineteenth century is most conspicuously seen. Down to 1873 there were eight superior Courts of First Instance: the King's Bench, the Common Pleas, the Court of Exchequer, the Chancery Court, the High Court of Admiralty, the Court of Bankruptcy, the Court of Probate, and the Court for Divorce and Matrimonial Causes. Most of these Courts had separate staffs of judges.

Mainly by the Judicature Acts of 1873, 1875, 1876, and 1894, taken in conjunction with an important Order in Council of December 16, 1880, order has been evolved out of the chaos which, however suggestive to the student of history, was distracting to litigants and lamentably wasteful both of time and money.

There is now one Supreme Court of Judicature divided into (1), the High Court of Justice; and (2), the Court of Appeal. The former has three divisions:

(1) The King's Bench Division, which now exercises the jurisdiction formerly exercised by the Courts of King's Bench, Common Pleas, and Exchequer, and the Court of

Bankruptcy. The Lord Chief Justice acts as President, assisted by a staff of fifteen judges.[1]

(2) The Chancery Division, under the Lord Chancellor and six other judges.[2]

(3) The Probate, Divorce, and Admiralty Division, under a President and one other judge.

Questions of fact may, in Divisions (1) and (3), be referred to a jury at the instance of either party; and in division (2) with the leave of the judge. But except in the King's Bench Division jury actions are rare, and even there tend to become less frequent. The importance of the change effected by the Judicature Acts is clearly explained by Maitland: 'To each of these divisions certain business is specially assigned . . . But this distribution of business is an utterly different thing from the old distinction between courts of law and of equity. Any division can now deal thoroughly with every action; it can recognize all rights whether they be of the kind known as "legal", or of the kind known as "equitable"; it can give whatever relief English law (including "equity") has for the litigants'.[3]

To this High Court there is, in certain cases, an appeal from inferior Courts.

From the High Court (including Courts of Assize) an appeal lies in almost every case to the Court of Appeal. This Court now consists of three *ex-officio* judges: the Lord Chancellor, the Lord Chief Justice of England, and the President of the Probate, Divorce, and Admiralty Division; and six permanent judges: the Master of the Rolls and five 'lords justices of appeal'. Ex-Lord Chancellors are also *ex-officio* judges of appeal, but can only be called upon to sit with their own consent at the request of the Chancellor.

From the Court of Appeal and from the Scotch and Irish Courts an appeal lies to the House of Lords—a

[1] Raised to sixteen (1910). [2] Raised to seven (1910).
[3] *op. cit.* p. 472.

tribunal the composition and procedure of which have been already described.[1]

There remains yet another Court of Appeal in regard to which something must be said. The Act of the Long Parliament (1641) which abolished the Court of Star Chamber deprived the Privy Council of all jurisdiction in England, but the Council still remained the supreme Court of Appeal for admiralty cases and for all the King's oversea dominions. This remnant of jurisdiction was not at the time important, extending only to the Channel Islands, the Isle of Man, and the American 'plantations'. With the growth of oversea dominions it has of course become far-reaching and highly important. In 1832 a further jurisdiction was conferred upon the King in Council Henry VIII had created a Court of Delegates for hearing appeals from the Ecclesiastical Courts; Elizabeth a similar Court for admiralty appeals. These Courts were abolished in 1832, and their jurisdiction was transferred to the Privy Council.

In the following year an important change was effected in the constitution of the Court which exercised the judicial functions of the Privy Council. Down to 1833 the work was in fact done by such members of the Council as had held high judicial office.

By an Act of 1833 the judicial work of the Council was transferred to a special Judicial Committee. This was to consist of the Lord President, the Lord Chancellor, and such other members of the Council as held or had held high judicial office. These were to include, in ecclesiastical cases, all the archbishops and bishops who were members of the Council. In 1871 four paid members were appointed, but their places have now been taken by the Lords of Appeal in Ordinary—the four 'law lords',[2] designated by the Act of 1876 for the judicial work of the House of Lords. Under the same Act (1876) the arch-

[1] *supra*, cc. vi and vii. [2] *supra*, c. vii.

bishops and such bishops as are members of the Privy Council may be summoned, for the hearing of appeals in ecclesiastical cases, as assessors, but they are no longer members of the Committee. The King may also appoint persons who have served as Indian or Colonial Judges. But, in effect, the composition of the Judicial Committee of the Privy Council is almost identical with that of the House of Lords sitting in a judicial capacity.

But there is an important difference in procedure. A judgement of the House of Lords is a quasi-legislative Act. A vote is taken and (if there be a division) the division list is published. The Judicial Committee, as befits a Committee of the Council, 'advises' the Crown. It is the King in Council by whom the Order, embodying the judgement, is formally made. The judgement of the Judicial Committee must, therefore, unlike that of the House of Lords be unanimous.[1] Moreover, while the latter is bound by its own decisions; the former is not.

Such is the machinery which now exists for the administration of justice in England. It is necessarily elaborate, but it has been straightened out and simplified to an almost incredible extent since 1873. A few words may be added on what it is now possible to describe as the antiquities of the subject.

English legal administration has almost from the first rested on two principles: (1) that the King is the source or fount of justice; and (2) that 'the suitors are the judges'. These two principles, at first sight contradictory, have in course of time been blended into the system with which we are familiar. The administration of justice must in primitive societies necessarily be mainly local. Hence the importance of the local Courts of the Shire and the Hundred described in a previous chapter. In those popular or 'communal' courts the 'justice' is practically 'folk right', and is administered by the freemen themselves, or in technical

[1] Or, at any rate, dissent must not be published.

phrase the 'suitors are the judges'. But against the maintenance of this idea two forces soon came to operate: the centralizing authority of the Crown, and the more immediate authority of the local territorial magnate; the force of feudalism. To some extent, however, in justice, as in government, these two forces 'cancelled out'. Between royal justice and feudal justice there was more of antagonism than between royal justice and communal. Hence the stern insistence of the Norman and Angevin Kings upon the attendance of the tenants-in-chief at the Shire Courts; upon the rights of the Sheriff even as against the 'franchises' of the Barons.

Under Henry I, still more systematically under Henry II, we see new machinery in operation. The Barons of the Exchequer, the King's Justices, go forth as Royal Commissioners to collect revenue and incidentally (at first) to administer justice. Their first business is to hold 'Pleas of the Crown', to decide, that is, any suits in which the King is interested. Simultaneously the central *Curia* takes on a specialized organization. At first it is difficult to draw any line between legislative, administrative, and judicial work. Gradually the functions are differentiated and the *Curia Regis* (as distinct from the *Concilium Regis*) emerges specifically as a Court of Justice. Later still we perceive three divisions of this Court: (1) the King's Bench—the King's own Court, held *coram ipso domino Rege*—the Court which had jurisdiction in all criminal cases, and in all Pleas of the Crown; (2) the Court of Common Pleas, for the trial of all cases between subject and subject; and (3) the Court of Exchequer, dealing with all cases involving revenue. By the reign of Edward I, each of these Courts has its own staff of judges. But the parent *Concilium* has not parted with all judicial function. It still belongs to the King-in-Council to redress inequities in the working of his Courts, and to correct the errors of his judges. These two germinal

ideas eventually give us the specialized Court of the Chancellor and the supreme appellate jurisdiction of the House of Lords.

To some extent these two Courts are in conflict. Between Parliament and the Council there was, as we have seen, a long and bitter struggle. Eventually the House of Lords finds its own work in correcting the errors in law of the ordinary Courts. Meanwhile, the Chancellor has been developing, side by side with the ordinary Courts but outside them, a jurisdiction of his own. It arises naturally from his function as Keeper of the King's Conscience.[1] There are cases in which the application of strict rules of law will result in a denial of equity. Thus there is gradually evolved a system of equity, designed to supplement the deficiencies and to correct the inequities of the common law, and the Court of Chancery has come into being. In time, particularly in the fifteenth century, and for reasons already explained, the Common Law Courts reveal weaknesses and deficiencies in the administration of criminal justice. There is room for a Court of 'criminal equity' (if one may so phrase it), particularly for a Court strong enough to deal with powerful offenders. The King's Council is the obvious resource, and the regular exercise of criminal jurisdiction in the Court of the Star Chamber is the result. The many controversial questions in connexion with the precise status of this Court are beyond the scope of this book. Clearly and indisputably, however, the Court of Star Chamber represents the jurisdiction of the Council, and by the Statute of 1641 the Council as clearly is deprived of it.

All this represents the development of the idea that the King in person is the source of justice, delegating the administration of it to whomsoever he will. But there is another root-idea of which it were unsafe not to take account. The 'suitors are the judges'. Justice is com-

[1] *supra*, p. 122.

munal as well as regal. I do not seek to connect this idea with the institution of which I am about to speak; there are too many pitfalls in the path; communal justice is clearly a Teutonic principle; trial by jury is mainly the development of a Norman idea. But the latter seems in a sense to fulfil an instinct which was deep rooted in our English system long before the Conqueror landed at Pevensey.

'Trial by Jury' represents two distinct ideas: on the one hand, the obligation resting upon the lawful men of a particular district to bring before the King's Justices those who are suspected of crime; and on the other, the ascertainment of facts by a process of inquest, by the sworn information of those who are personally cognizant of the facts. We can trace here the lineaments of our 'grand' and 'petty' juries. It is still the business of the legal men of the shire—of the county magistrates sitting as a 'grand jury'—to indict before the King's Judges the persons reasonably suspected of crime; to find against them 'a true bill'. The 'petty' jury were originally not judges of fact, but sworn witnesses. They represented a form of 'inquest' applied in the first instance to an ascertainment of the fiscal rights of the Crown. The facts recorded in the Domesday Survey were obtained by commissioners, from sworn information laid before them by the men of the particular locality concerned. The procedure was subsequently adapted to many other purposes; to the determination of questions of ownership; of obligations in regard to national defence; and ultimately to criminal investigations. The 'sworn men' were witnesses to facts. Later on, the original jury, imperfectly acquainted with the facts, were 'afforced' by others who could speak to them from personal knowledge. Thus the 'jury' was gradually distinguished from 'witnesses'. Ultimately the divorce becomes complete. The jury must arrive at a decision as to the facts from the sworn testimony laid before them by witnesses and from that only.

In the persistence of the jury system we have a further illustration of a characteristic English trait to which attention has already been directed: a certain mistrust of 'expert' or 'professional' opinion; a desire to associate laymen with experts, amateurs with professionals. We have seen it in the harmonious co-operation of Cabinet Ministers and Civil Servants; of Town Councillors and Town Clerks; of stipendiary and unpaid Magistrates. Most remarkable of all, perhaps, is the association of the 'learned' judge and the unlearned jury.

CHAPTER XV

THE STATE AND THE EMPIRE: DOMINIONS, COLONIES, AND DEPENDENCIES

'The relation of a modern state to her highly developed colonies opens out a class of unprecedented facts demanding a class of political expedients equally unprecedented.'—SHELDON AMOS.

'We are not now to consider the policy of establishing representative government in the North American Colonies. That has been irrevocably done, and the experiment of depriving the people of their present constitutional power is not to be thought of. To conduct the government harmoniously in accordance with its established principles is now the business of its rulers. . . . The Crown must . . . submit to the necessary consequence of representative institutions; and if it has to carry on the government in unison with a representative body it must consent to carry it on by means of those in whom that representative body has confidence.'—LORD DURHAM.

'There never has been anything so extraordinary under the sun as the conquest and still more the government of India by the English; nothing which from all points of the globe so much attracts the eyes of mankind to that little island whose very name was to the Greeks unknown. Do you conceive that a nation which has once filled this amazing space in the imagination of our race can withdraw from it with impunity? For my part I do not think so. I think the English are obeying an instinct which is not only heroical, but true, and a real motive of conservation in their resolution to keep India at any cost.'—TOCQUEVILLE.

'Such is the British Empire of to-day: an elaborate mosaic wherein, side by side with the Empire of India, Dominion, Commonwealth, Self-governing Colony, Crown Colony, Chartered Company, Protectorate, Sphere of Influence, adds each its lustre to the pavement which is ever being trod by fresh generations of our race as they pass to and fro.'—H. E. EGERTON.

WE have so far considered the United Kingdom merely as a unitary State of the ordinary type, with the political

institutions appropriate thereto. But no survey of English institutions could pretend even to provisional completeness if it were arrested at this point. England may be the predominant partner of the United Kingdom; but the United Kingdom is itself the centre and sovereign of the greatest Empire known to human history.

Figures can convey but a feeble impression of its magnitude, still less of its potential greatness. They are, indeed, in a sense misleading. But for what they are worth they may be recorded.

The British Empire extends over one-fourth of the whole surface of the globe, and contains about one-fifth of its inhabitants. The total area of the Empire is over 11½ millions of square miles. Of this total the United Kingdom claims 121,027 square miles, India 1,766,797, British North America nearly four millions, Australasia over three, and United South Africa nearly half a million. Thus, taken together, the self-governing Dominions—the sister-nations—claim nearly three-quarters of the whole. Put in another way, which may perhaps bring facts home to us more vividly, we may say that the whole Empire is about ninety-one times as big as the United Kingdom; that King George V is the Sovereign lord of one United Kingdom in Europe and ninety others scattered over the face of the globe. These figures exclude Egypt and the Soudan. The distribution of population presents a very different picture.

The total population of the Empire is about 400 millions, or 420 including Egypt, the Soudan, and a few outlying Protectorates or spheres of influence. Of the 400 only about 55 are people of European descent. Of these the United Kingdom claims 45, Canada nearly seven, and Australasia about 4¾ millions. United South Africa has a population of some 5½ millions, of whom nearly a million and a quarter are white. India alone has a population of nearly 300 millions, and the balance is contributed by the West Indies and the

outlying possessions. Interest naturally concentrates, save for the great Dependency of India, which stands entirely apart, upon the self-governing Colonies, though the cutting of the Panama Canal will unquestionably restore to the West Indies something of the importance which, during the last century, they lost.

Geographically, the Empire falls naturally into six great groups: (1) the European, with the United Kingdom itself, the Isle of Man, the Channel Islands, and the strategical points in the Mediterranean—Gibraltar, Malta, and Cyprus; (2) the North American, including, besides the great Dominion of Canada, Newfoundland and Labrador, British Guiana, Honduras, the Falkland Islands, and Bermuda; (3) the Australasian, including the Commonwealth, New Zealand, Fiji, and New Guinea; (4) the African, including, in addition to the four united Colonies, Rhodesia, Nigeria, various Protectorates, and some strategical points, such as St. Helena and the Mauritius; (5) the Asiatic, including, besides India itself, Ceylon, Hong Kong, the Straits Settlements, the Malay States, Labuan, North Borneo, and Sarawak; and finally (6) the West Indian Islands, of which the most important are Jamaica, Bahamas, Barbados, Trinidad, and Tobago, the Windward and Leeward Islands.

Constitutionally this vast Empire is so heterogeneous as almost to defy classification, but it falls broadly into three great groups. The first includes the Colonies with 'responsible' government, the great self-governing Dominions or 'Sister-States'. At the opposite pole are the Crown Colonies. The latter may be further subdivided, but they are all administered more or less autocratically by a Governor who is directly responsible to the Colonial Office in Whitehall. Intermediate between the Crown Colonies and the 'responsible' Dominions are the Colonies endowed with representative Legislatures but without a responsible Executive.

Outside these broad categories we must take note of the

territories which, like Rhodesia, are still administered by Chartered Companies; Protectorates, such as Bechuanaland and Uganda; and various 'Spheres of Influence'. This Constitutional classification will demand more detailed consideration later on. For it is hardly possible to render it intelligible without some account, however short and summary, of the way in which the Empire was built up. For the moment, we exclude India and confine ourselves to the *Colonial* Empire proper.

According to legal definition the term *Colony* includes 'any part of His Majesty's dominions exclusive of the British Islands (i. e. the United Kingdom, the Channel Islands, and the Isle of Man), and of British India'.[1] The term is thus equally applicable, in a legal sense, on the one hand to Hong Kong, a trading station, Gibraltar, a fortress, and Ascension, which is administered not by the Colonial Office, but by the Board of Admiralty, in whose books it is said to be 'rated' as a man-of-war; and, on the other, to Canada, South Africa, and Australia. These latter have of late repudiated the term Colony, with its supposed implication of inferiority and subordination, and desire to be known as Dominions. In view of the mixed company to which they were consigned by the Interpretation Act of 1889, their susceptibility is not wonderful, and in any case must be respected. Otherwise, there would be much to be said for confining the term 'Colony' to those lands which alike by their expanse, their voidness, and their climate offer almost illimitable fields for the expansion of the British race; and consigning all else to the category of dependencies.

The history of the oversea Empire falls into two broad periods: the first extends from the foundation of Virginia (1607) to the loss of the thirteen Atlantic Colonies of America in 1783; the second, from 1783 to the present day. In each of the two periods the growth of the Empire

[1] Interpretation Act, 1889 (52 & 53 Vict. c. 63, § 18 (1, 3)).

was due to the operation of two forces: that of conquest, and that of peaceful plantation,—colonization by simple settlement.

During the first period we founded, mainly, though not exclusively, by peaceful plantation, an Empire, great even then and with untold potentialities; we founded it and lost it. In the second period we have founded, partly by conquest, partly by discovery and settlement, an Empire still vaster in extent, and in potentialities superior even to the first. It is the question of questions, not merely for Great Britain, or for Greater Britain, but for the world at large, whether British statesmanship—the statesmanship of the mother and daughter lands—will be equal to the supreme task of devising means for averting from the second Empire the fate which befell the first.

The history of the first and lost Empire must not detain us at any length. It opens, in a Constitutional sense, with the grant (1600) by Queen Elizabeth of a Royal Charter to a company of merchants, to trade with the East Indies. In 1606 a similar grant was made by James I to the Virginia Company. Between 1607 and 1732 Englishmen established themselves, under every variety of condition, on the narrow strip of land between the Alleghanies and the Atlantic sea-board of America. Here were planted the original thirteen Colonies. The foundation of twelve of them was due to simple settlement on lands uninhabited by white men and sparsely peopled by natives; the thirteenth, the New Netherlands, came into our hands by conquest from the Dutch (1667), and was rechristened after its first English proprietor, the King's brother and heir presumptive to the throne, New York. The acquisition of New York made the English masters of the Eastern sea-board of North America from Carolina to Maine.[1]

Meanwhile, Newfoundland had long since been formally

[1] Georgia was colonized later—in 1732.

though not effectively occupied, and during the first half of the seventeenth century Barbados, the Bahamas, the Leeward and Windward Islands were occupied in the name of the English Crown. The conquest of Jamaica from the Spaniards in 1655 was, however, the real beginning of our West Indian Empire. Already we were at conflict in the New World with European neighbours.

Not Spain, however, nor the Netherlands, was destined to prove our real rival in the Far West. That rival was France.

France was comparatively late in entering upon the field of colonial enterprise. But even so she was considerably ahead of England. It was in 1534 that Jacques Cartier first sailed up the St. Lawrence, and two years later that he took out a band of two hundred settlers who laid the foundations of French Canada. Early in the seventeenth century the French founded Quebec and Montreal, and effected settlements on the island of Cape Breton and upon the peninsula of Acadíe, better known to us as Nova Scotia. Thus was France firmly established to the north of the English Colonies in North America; and not there only. In 1673 Marquette, a Jesuit missionary, led an expedition from the Canadian lakes which made its way some distance down the Mississippi. Some years later Lasalle, a French fur trader, reached the mouths of that great waterway. About 1700 the Colony of Louisiana was established. It is soon after this that we begin to hear of the French claim to the whole vast *hinterland* of the American continent, from the valley of the Ohio to the Pacific. France was willing, for the time at any rate, to leave to the English colonists the narrow strip of land already occupied between the Alleghanies and the Atlantic, but everything to the west of the Alleghanies was to be under the dominion of France.

Nor were the French wholly without the means of enforcing claims so far-reaching. Firmly planted on the St. Lawrence and on the Mississippi their position was one of

immense strategical advantage—given one condition. Their claim to the hinterland was empty words, their attempt to hem in the English Colonies behind the Alleghanies was mere foolishness, unless they could establish a strong line of communications between Canada and Louisiana, and this, during the first half of the eighteenth century, was the supreme object of French military policy in the new world. Nor did it fall far short of success. France actually built a line of fortresses from the Lake Champlain to the sources of the Ohio—Crown Point, Ticonderoga, and Fort Duquesne. Could they complete the chain? Could the French in Canada join hands with the French in Louisiana, and thus effectually hem in the English Colonies between the Alleghanies and the sea? If they could the days of English supremacy on the American continent were numbered, or rather would never be counted at all.

The crisis was reached in the years between 1740 and 1760, the period covered by the wars known in English history as the War of the Austrian Succession (1740–8) and the Seven Years' War (1756–63). As regards the North American continent the two wars are merely two acts of one drama, the drama which was to decide whether England or France was to dominate the Great West. Details are quite beyond the scope of this chapter. Enough to say that thanks to the tardy but complete awakening of England under Pitt, thanks to the military genius of Amherst and Wolfe, and to the naval victories of Boscawen and Hawke, the danger was averted; the chain of fortresses was broken; and the English of the Eastern Colonies were left free to expand into the illimitable lands of the Far West.

More than that. The capture of Fort Duquesne—the real key to the position—in 1758, followed by that of Ticonderoga and Crown Point in 1759, averted all real danger from France. The capture of Quebec in 1759 carried the war into the enemy's country and put

Canada itself at the mercy of England. By the Treaty of Versailles in 1763 England retained that great prize, and at the same time took Florida from Spain. Henceforward there could be no question as to which race was to be dominant on the North American continent. The long struggle had ended in the discomfiture of the Latin and the triumph of the Teutonic folk.

But not without qualms was Canada retained. There were those in England who would have preferred to see it restored to France, in exchange perhaps for one or two additional islands in the West Indies. In favour of such an exchange there was much, at the time, to be said. None dreamt of the potential wealth of the barren North; the rich islands were at that time far more accounted of than the ice-bound continent. But this was not the only argument. 'The possession of Canada,' wrote one, 'far from being necessary to our safety may in its consequences be even dangerous. A neighbour that keeps us in some awe is not always the worst of neighbours.' It was not only Englishmen who perceived the dangers ahead. 'England,' wrote Vergennes, 'will soon repent of having removed the only check that could keep her Colonies in awe. They stand no longer in need of her protection. She will call on them to contribute towards supporting the burdens they have helped to bring on her, and they will answer by striking off all dependence.' Vergennes' prediction was fulfilled to the letter: so literally, indeed, that it is difficult to believe that it was not apocryphal.

But despite these sinister predictions Canada was retained at the Peace of 1763. Within twenty years the thirteen original Colonies were lost.

Into the story of the disastrous fratricidal struggle which issued in the great disruption of 1783, it is no part of my purpose to enter. The quarrel itself was due to several contributory causes. The acquisition of Canada was not

among them; but it cannot be doubted that the expulsion of the French from Canada and the Ohio valley and that of the Spaniards from Florida gave the English colonists the opportunity for indulging with safety any quarrelsome temper to which, on other grounds, they might be inclined. Nor was taxation the prime cause of the dispute. Too much has been made of the Stamp Act. It was heartily disliked, and afforded to the disaffected a convenient fulcrum for agitation. But, after all, it remained upon the Statute-book hardly a twelvemonth. The root-cause of the disruption was the attempt on the part of the mother-country to restrain the trade of the Colonies within the narrow limits permitted by the Navigation Laws. Those laws had been on the Statute-book for a century; but they had been almost entirely disregarded. George Grenville, honestly but stupidly, thought it his duty to enforce them. The American Customs, so far from yielding a revenue, were an actual drain upon the resources of the mother-country. Massachusetts had, by connivance, become a nest of smugglers. Grenville wanted money for the defence of the Colonies, and in an unlucky moment bethought him of the disregarded trade laws. His ingenuity lost us the American Colonies. But there were other reasons. The French were, naturally, burning for revenge, and did all in their power to exacerbate the quarrel and to render the breach irreparable. War once begun, other nations were quick to reveal the jealousy with which they regarded the marvellous success which had attended England on land and at sea for the last half-century. By 1780 we were virtually at war with the world. France, Spain, Holland, and the confederate Colonies were open enemies. Russia, Prussia, Denmark, Sweden, and others were leagued against us in 'armed neutrality'. Ireland, organized in a volunteer force, seized, not unnaturally, the unique opportunity for asserting the independence of her Parliament; of taking the Home Rule we were in no con-

dition to refuse. Gibraltar was saved only by a heroic defence; India, but for Warren Hastings and the veteran Coote, had been wrested from our grasp. In England itself George III had succeeded to the sceptre of Pitt, with results revealed in the contrast which Saratoga and Yorktown afforded to Quebec and Fort Duquesne.

The year 1783 is the point of demarcation between the old colonial system and the new. The great schism left England without any colonies proper—vacant fields open to settlement by the English race—except Newfoundland. Canada and Nova Scotia were colonies of Frenchmen which had lately come into the hands of England by conquest; the West Indies—saved from the general wrack by the victories of Rodney—were immensely valuable plantations; British India was a great dependency governed by a Chartered Company. The *colonial* system had to be built up afresh.

The first start was made in Canada. The triumph of 1783 was marred for the American States—soon to become united—by the scandalous treatment accorded to the 'loyalists'—those who had remained faithful to the mother-country in the recent war. Ruined in estate and socially outcast the independent States no longer afforded a home to them. Even France intervened to restrain the vengeance taken by her victorious allies. We did our utmost to mitigate the hardness of their lot. Free grants of land were offered to them in Canada, and in the years immediately following the Peace, thousands of them flocked over the border into Canada. The immigrants from the States were joined by emigrants from home, and in this manner a new Canada was added to the old. Friction presently arose. The old Canada was French in blood and Roman Catholic in creed; the new was English and Protestant. Pitt realized the difficulty, and by his Canada Constitutional Act of 1791 made a bold attempt to grapple with it. Canada was divided into two provinces, Upper (Ontario) and Lower (Quebec);

and in each there was to be a bicameral Legislature: (1) an elected Legislative Assembly; and (2) a small Legislative Council, consisting of persons nominated by the Crown for life. In neither colony was the Executive to be responsible to the Legislature. The *Constitutional Act* followed pretty closely the type of government which had been evolved in the American Colonies. The thirteen Colonies had presented many varieties of detail; but the typical Constitutional form was that of a Governor, a nominated Council, and an elected Assembly. The system never was ideal; functions were ill defined; the Governor's position as between the English Crown and his colonial subjects (on whom, as a rule, his salary was dependent) had been often painfully ambiguous: one part Viceroy, another part Prime Minister, a third part managing-director of a commercial company. The Council, except in Pennsylvania and Massachusetts, had been nominated by the Crown, but it was not strictly an Upper House, still less strictly was it an Executive Council. It played to some extent both parts, but only in Massachusetts, where it was elective, with any degree of effectiveness. As a rule, the elected Assembly had quickly drawn to itself all but supreme power, and it was power without the responsibility which comes from participation in the Executive Government.

This was the rock on which Pitt's scheme for Canadian government really foundered. It worked tolerably well for a time; but not seldom there was acute friction between the Governor and the Assembly; between the Executive and the Legislature, which had the power of the purse. There were other elements of discord—ecclesiastical, fiscal, and racial; but at the root of them was the Constitutional problem: the difficulty of working representative institutions without an Executive responsible to the Legislature. In 1837 all Canada was in ferment; Lower Canada was in open rebellion. Sir Robert Peel wrote to Wellington[1] in

[1] *Peel Papers*, ii. 355.

terms which would suggest that the 'immediate loss of Canada' was not a remote contingency. The crisis was undeniably very serious. Lord Durham was sent out by the Government, and though his rashness compelled them to recall him in something like disgrace he drafted a Report[1] which remains to this day one of the most important State documents in the entire history of British colonial administration. Lord Durham went out to Canada with the avowed hope that he might be 'the humble instrument of conferring upon the British North American Provinces such a free and liberal Constitution as shall place them on the same scale of independence as the rest of the possessions of Great Britain'. His ambition was more than fulfilled. Like Eliot and Pym he fixed upon the principle of a 'responsible' Executive as the corner-stone of Constitutional liberty, and insisted that if confidence and loyalty were to be restored in Canada it could only be in one way: 'the Crown must consent to carry the Government on by means of those in whom the representative members have confidence.' And again: 'The Governor . . . should be instructed that he must carry on his Government by heads of departments in whom the united Legislature shall repose confidence; and that he must look for no support from home in any contest with the Legislature except on points involving strictly Imperial interests.' In a word, the Cabinet system must be introduced into the Colonial Constitution; Ministers must be responsible to the local Legislature, and the Governor, acting in all matters of merely local interest on their advice, must accept the position of a 'Constitutional' ruler. This is the key-note of the *Durham Report*, a document which is now easily accessible, and should be carefully studied by all who seek to understand the Constitutional evolution of the oversea Dominions of the British Crown.

In accordance with Lord Durham's recommendations the

[1] Reprinted by Methuen & Co., 1902.

Canadian *Union Act* of 1840 was passed by the Imperial Parliament. Under this Act the two Canadas were once more united, and for the whole Colony there was to be one Legislature, with a 'responsible Executive'. The Legislature was to be bicameral: an elected *Assembly* and a *Legislative Council* consisting of not less than twenty persons nominated by the Crown for life. Curiously enough, the principle on which Durham laid so much stress was not specifically enunciated in the text of the Act. The Act merely refers (§ 45) to 'such Executive Council . . . as may be appointed by Her Majesty'. As to the mode of appointment there is not a word. And though this was recognized as the key-note both of Durham's recommendations and the policy of Lord Melbourne's Government, it was not until the Governorship of Lord Elgin—Durham's son-in-law—that the Cabinet system was definitely established in Canada. In 1847 Lord Elgin was formally instructed 'to act generally on the advice of the Executive Council and *to receive as members of that body those persons who might be pointed out to him by their possessing the confidence of the Assembly*'. In this fashion—characteristically indirect—did the principle of 'responsible Government' make its way for the first time into a colonial Constitution.

Nor did it fail to justify the expectations founded upon it. The friction between Legislature and Executive, almost continuous between 1791 and 1840, rapidly abated. But the Union Act of 1840 was not destined to finality. It solved one great problem, but it accentuated another. In one respect, indeed, it was clearly retrograde. In 1791 Pitt had recognized the existence of two Canadas; the Act of 1840 sought to unite them into one. It entirely failed to do so, and the longer it had remained upon the Statute-book the more conspicuously would it have demonstrated its ineptitude. For British North America never has been a unity. Provincial feeling has always been strong, and

though the presence of a powerful neighbour has prevented the triumph of separatism, geography and sentiment have combined to prohibit unity. Only one Constitutional device could avail to reconcile the opposing forces, centripetal and centrifugal. Some form of federation was inevitable unless British North America was to disintegrate into fragments whose weakness would tempt irresistibly the cupidity of neighbours. The movement towards Canadian federation came to a head under the Governorship of Lord Monck, and in 1867 the British North America Act was passed by the Imperial Parliament. Ontario, Quebec, Nova Scotia, and New Brunswick were the original units of the federation, which now includes, in addition, Manitoba, Vancouver and British Columbia, Prince Edward Island, Alberta, and Saskatchewan. Linked together by that great Imperial highway, the Canadian Pacific Railroad, these nine Provinces now form the federal Dominion of British North America.

Legislative power is vested in the King and a Parliament of two Houses: a Senate consisting (1910) of eighty-seven members nominated for life by the Crown on the advice of the Ministry. Twenty-four Senators are assigned to Quebec and Ontario respectively, ten each to Nova Scotia and New Brunswick; four each to Manitoba, Alberta, Saskatchewan, and Prince Edward Island, and three to British Columbia and Vancouver. In the House of Commons Quebec has and must always have sixty-five members, the rest being assigned to the several Provinces according to population. The Executive is vested in the Governor-General, assisted by a Cabinet responsible to the Legislature and known as the 'King's Privy Council of Canada'. In each Province there is a Lieutenant-Governor with a Legislature consisting (except in Quebec and Nova Scotia) of a single Chamber and an Executive responsible thereto.

The Constitutional evolution of Canada is important, not only in itself, but because it has, in broad outline, supplied

a model for the other great colonial dominions of the Crown. The *règne militaire* subsisted from the conquest in 1760 to the passing of the Quebec Act of 1774. From 1774 to 1791 it was governed as a Crown Colony; from 1791 to 1840 it had a representative Legislature without a responsible Executive; from 1840 to 1867 it enjoyed 'responsible' government under a unitary Government, and from 1867 onwards responsible government combined with federalism.

From the Federal Dominion Newfoundland has so far held aloof in dignified but unfortunate isolation; an isolation partly at any rate inspired by an imaginary 'seniority' among British colonies. Newfoundland has since 1855 enjoyed 'responsible' government, with a Governor and a bicameral Legislature.

Belonging to the same North American group are the Bermudas, a strategic point of some importance, governed by a Governor who is also Commander-in-Chief, a Privy Council, and a bicameral Legislature. The Executive, however, is not responsible.

From the Bermudas it is an easy stage to the West Indies, which after the first schism of 1783, if not before it, were regarded as the most valuable asset of the Colonial Empire. From that proud position they have been displaced, on the one hand by the acquisition and development of other colonial possessions, on the other by their own decline in economic importance. The first serious blow to their industrial prosperity was dealt by the emancipation of the slaves (1833), and quick on the heels of that came the adoption of the new commercial policy which dissipated the last remnants of economic stability. The abolition of slavery combined with the abolition of preferential duties for colonial products was particularly hard upon the West Indies. They are now, however, beginning to recover from the blow and to adapt themselves to new conditions.

Constitutionally they now illustrate the great varieties of Crown Colony government. Originally they conformed to the ordinary Colonial type: a Governor with a nominated Council and an elected assembly. But the abolition of slavery introduced complications, and the tendency has been, though not uniformly nor universally, to replace the elected Assembly by one wholly or mainly nominated. The Bermudas, Barbados, and the Bahamas alone retain purely elective Legislatures. In no case is the Executive responsible, and it is a question how long elected Legislatures are likely to subsist without it. The Parliamentary or 'responsible' system has conspicuous merits; so has 'dictatorial' rule; the intermediate device is, as Mr. Lowell points out, full of pitfalls. 'A Legislature elected by the people, coupled with a Governor appointed by a distant power, is a contrivance for fomenting dissensions and making them perpetual.'[1] The intermediate type, therefore, tends to disappear; either giving place by natural evolutionary process to the higher form of 'responsible' Government, as in the case of Canada and the Australian Colonies; or being abandoned, as in that of Malta or Jamaica, in favour of more autocratic rule. So long as the whites in Jamaica were a dominant oligarchy in the midst of a large unfree population, the intermediate type was the natural one; had the conditions been perpetuated it might in due course have led to 'responsible' administration. But the emancipation of the slaves fundamentally altered the conditions and rendered inevitable the adoption of the Crown Colony system.

Of all the examples of that system India is the greatest. India, it is true, is not a Colony at all either in the technical or in the practical sense of the term. In every sense it stands apart. Controlled by a separate Department in the Home Government, administered by a separate, a specially

[1] *op. cit.* ii. 416.

selected and specially trained body of Civil Servants on the spot, presenting to those who are responsible for its Government problems which are strictly unique, India is a theme so vast and intricate that it demands, if touched at all, treatment on an appropriate scale. That being here impossible, the barest outline of the administrative machinery must suffice.

Authorized by Royal Charter originally granted in 1600 and renewed in 1698, the East India Company established its factories in Madras, Bombay, and Bengal, during the course of the seventeenth century. Down to 1773 the British Parliament had no direct responsibility for Indian affairs. But by that time the Company, exceedingly prosperous in its early years, had fallen financially upon evil days. Its history affords an admirable illustration of the instability due to double-mindedness. So long as the Company pursued its commercial objects with a single eye it prospered exceedingly; so soon as it was directed by inevitable circumstances to more ambitious political ends its financial success was at an end. A company of merchants had by a process which we cannot follow become rulers of a great Empire. The two characters are, as Adam Smith long ago pointed out, mutually inconsistent. 'If the trading spirit of the English East India Company renders them very bad sovereigns, the spirit of sovereignty seems to have rendered them very bad traders.' Adam Smith, like Burke, was unduly severe upon their rule; but undoubtedly their financial difficulties were extreme. Lord North came to their help in the *Regulating Act* of 1773, but the Government, as is its wont, exacted its pound of flesh. That Act marks the first interference of the British Parliament in Indian affairs; and the intervention was still indirect. Pitt's Act of 1784 went much further. It virtually transferred responsibility for the political administration of British India to a Cabinet Minister and a Government Department.[1] During the

[1] *Supra*, p. 115

next seventy years British India more than doubled in extent. In 1857—partly as a result of this rapid territorial expansion—the Mutiny broke out, and in 1858 the rule of the East India Company was finally terminated, and British India passed formally and directly into the hands of the Crown. In 1876 the Queen, with the approval—somewhat reluctant—of Parliament, adopted the appropriate title of Kaisar-i-Hind, and on January 1, 1877, she was, with great solemnity, proclaimed Empress of India in the ancient capital of the Moguls.

The organization of the Secretarial Department responsible for the Government of India—the Secretary of State in Council—has been already described.

In India the British Crown is represented by a Viceroy, appointed by the Home Government, for five years. The Viceroy is assisted by an Executive Council consisting of six ordinary members appointed as a rule for five years by the Crown. The Commander-in-Chief is *ex officio* an extraordinary member of the Council, and the Crown may also appoint one additional extraordinary member. Each member of the Executive Council is responsible for one of the great Administrative Departments; these Departments are seven: Home, Military, Legislative, Public Works, Revenue and Agriculture, Finance and Commerce. The seventh, the Foreign Department, is under the immediate and personal supervision of the Viceroy.

Besides the Executive Council there is a Legislative Council, which includes, besides the members of the Executive, sixty 'additional' members. Of these thirty-five are nominated and twenty-five elected. Of the former not more than twenty-eight may be official, and three must be non-official, representing respectively the Indian commercial classes, the landholders in the Punjab, and the Mohammedan community of the Punjab.[1] The twenty-five elected

[1] *Annual Register*, 1909, p. 385.

members are elected by a number of enumerated bodies or classes of persons such as the Provincial Councils, or the Chambers of Commerce.

The Provincial Governments of India reproduce in their main features that of the Governor-General. The Presidencies of Bombay and Madras have each their own Governor, with Executive and Legislative Councils; the two Bengals, the United Provinces, the Punjab, and Burmah, are under Lieutenant-Governors, assisted in each case by a Legislative Council composed partly of nominated and partly of elected members.[1]

The Governors of Bombay and Madras are appointed by the Crown; the Lieutenant-Governors by the Governor-General, subject to the approbation of the Crown.

The Governor-General is legally subordinate to the Secretary of State in Council, but he has the exclusive right of initiation in his Legislative Council, and can veto or reserve for the King's pleasure any law passed by the Council. The Home Government has the right to disallow any measure passed in India.

The vast work of Indian administration is carried on by members of a Civil Service, entrance to which has, since 1853, been obtained by open competitive examination.

Besides the direct government of British India, England has made itself responsible for the maintenance of peace and order throughout the whole peninsula. British India covers 1,078,000 square miles, and has a population of 232,000,000. The 694 Native States cover 700,000 square miles and contain 62,500,000 people. The latter vary from great kingdoms like those of Hyderabad and Mysore down to petty tribal chieftainships, but all alike are now feudatory to the British Raj. The position of the British political agent

[1] For a full description of the changes effected in Indian Administration by the Acts of 1909, see *Annual Register* for 1909, pp. 382–6.

varies, however, enormously in different native States. In some he is merely a friendly and not too intrusive adviser to the native Prince; in others he is in all but name the ruler of the State. Even in the greatest of the States, however, the Prince has control only over domestic policy; foreign policy is in the hands of the Emperor-King, and without his leave not a shot may be fired in India. And this position is now cheerfully accepted by the native Princes. 'Their loyalty,' says an acute French critic of our rule in India, 'is indisputable . . . it is beyond a doubt that they have henceforth bound up their fortunes indissolubly with British rule.'[1]

British India was in process of making at the time of the great schism of 1783; it remains to notice two great groups of colonies which have come into our possession since that time. Canada belongs partly to the old colonial system, partly—and indeed mainly—to the new. Australia, New Zealand, and South Africa belong wholly to the new. The two former came into our keeping in virtue of discovery and simple settlement; the last by conquest and purchase.

In a sense we owe the settlement, if not the acquisition of Australia to the loss of America. After the acknowledgement of independence, Carolina, hitherto utilized as a penal settlement, declined—and very naturally—to receive English convicts any longer. It was suggested that some part of Australia, rediscovered by Captain Cook in 1769 and by him 'occupied' in the name of his Sovereign, should be used for this purpose. In 1787 the first gang of convicts was dispatched from England to Botany Bay, and to them New South Wales owes its beginning as a land of settlement for men of British blood. For thirty years it remained—to all intents and purposes—exclusively a convict settlement; but in 1821 the Colony was thrown open to free immigrants, and in 1840 the transportation of convicts was prohibited.

[1] Chailley, *Problems of British India*, p. 256.

Down to this time the government of the Colony was naturally of the severest military type; but in 1842 a Legislative Council, partly nominated, partly elected, was established, and in 1850 an Act was passed by the Imperial Parliament virtually giving to the Australian Colonies general powers to settle for themselves the details of their Constitution. They quickly acted upon this permission, and in 1854–9 'responsible' government was established in New Zealand and in New South Wales, as well as in the daughter-colonies of New South Wales—Victoria, Tasmania, South Australia and Queensland. Western Australia attained to the same dignity in 1890. In each of these Colonies there is now a Governor, representing the Crown, a Legislature of two Houses, and a Cabinet responsible to the Legislature. In New South Wales and Queensland, as well as in New Zealand, members of the Second Chamber or Legislative Council are nominated for life nominally by the Governor, virtually by the Ministry, without limit of numbers. In the other Colonies they are elected.

But no more in the case of Australia than in that of Canada did 'responsible' Government form the final stage of Constitutional evolution. Ever since 1849 the expediency of some form of union among the English Colonies on the Australian continent had been intermittently discussed, but not until 1884 was there any serious attempt to bring it about. A period of financial disorder delayed the matter for a time, but from 1890 to 1900 it engaged the serious and almost continuous attention of the leading statesmen of the several Colonies. Particular care was expended upon the detailed provisions of the federal Constitution, and at last the scheme was brought to fruition in the *Commonwealth Act* of 1900.

The six Australian Colonies, New South Wales, Victoria, Tasmania, Queensland, South and Western Australia now form for many purposes a single whole. A Governor-

General represents the British Crown and the legislative power, is vested in him and a bicameral legislature: a Senate and a House of Representatives. The Senate, like that in America, enshrines the federal idea. It is the sheet-anchor of the rights of the smaller States, for in Australia, as in America, each State has equal representation in the Senate. At present it consists of thirty-six members, six from each State, and this principle of equality is unalterable.[1] The Executive is vested in the Governor-General assisted by a Cabinet. The seven members of the Cabinet are heads of the Administrative Departments, and by a provision, which as far as I know is unique, *must* be members of the Legislature. In this provision we have an interesting illustration of the crystallization of a Constitutional convention into law. Whether the Cabinet system will prove to be compatible with Federalism is one of the moot points for the solution of which all students of institutions will eagerly scan the future of Australian politics. If it does prove to be so, the Australian Commonwealth will have accomplished a successful bit of research work in the laboratory of Political Science. Be this as it may, Britons throughout the world will re-echo the fervent hope of Queen Victoria, 'that the inauguration of the Commonwealth may ensure the increased prosperity and well-being of my loyal and beloved subjects in Australia.'

The third of the great groups of self-governing Dominions is that of South Africa. Of the South African Colonies the original nucleus was the Cape Colony. Occupied by two adventurous Englishmen under James I, but declined by that monarch, the Cape Colony was planted by the Dutch East India Company in 1652, and by them was used for two purposes: as a port of call for Dutch East Indiamen, and as a vegetable garden. The fresh vegetables with which the merchantmen were thus supplied saved thousands of

[1] For details cf. Marriott, *Second Chambers*, pp. 167-78.

lives threatened by scurvy. From the middle of the seventeenth century to the end of the eighteenth the Cape was regarded as a dependency of the Dutch East Indies, and was administered from Batavia. In 1795 the United Provinces were conquered by the French Republic, and were converted into the Batavian Republic. The Stadtholder found himself a fugitive in England, and begged the English Government to save the Cape Colony from the fate which had befallen the United Provinces. They did. The Cape was occupied by a British force, but, on the conclusion of the Peace of Amiens (1802) the Colony was, with scrupulous honesty, handed back to the Batavian Republic. On the renewal of the war it was certain that Napoleon would utilize the Cape as an important strategical point in his duel with England. It was accordingly reoccupied in 1806 and retained until the final settlement of 1814, when it was purchased by Great Britain from the Netherlands for £6,000,000 sterling.

Not until after 1820 was there any considerable English immigration. Soon after that troubles began between the English rulers and the Dutch farmers. Into the many causes of friction it is impossible to enter. Enough to say that they eventuated in the Great Trek of 1836–40, and in the consequent founding of the Orange Free State and the Transvaal Republic.

Meanwhile, in 1824, a handful of English colonists established themselves at Port Natal, and after many vicissitudes Natal was finally proclaimed to be a British Colony in 1843. Until 1856 it formed part of Cape Colony, but in that year it was established as an independent Colony, and in 1893 attained to the dignity of 'responsible' Government. Cape Colony had reached the same stage in 1872. The Transvaal and the Orange Free State having been finally annexed by Great Britain in 1902, were endowed with responsible Government in 1906 and 1907 respectively.

But again, as in the case of Canada and that of Australia, the attainment of responsibility was but the prelude to closer union. This stage was reached by the four South African Colonies in the *Union Act* of 1909. But between South Africa and the other Dominions there is a difference. The Constitutions of the latter are genuinely federal: that of South Africa is unitary. The four colonies practically merge their identity in United South Africa, and accept the status of *Provinces*. To the existing Colonial Legislatures it will fall to elect the first Senate of the South African Union, but having performed that final act they will cease to be.

It will not, of course, be imagined that the four Provinces of the South African Union exhaust the tale of British possessions in Africa. The others exhibit almost every variety of governmental type; Rhodesia, under its Chartered Company; Crown Colonies, like Lagos and Sierra Leone; Protectorates, like Bechuanaland, Uganda, and Nigeria; an undefined sphere of influence like that of Egypt, whose peculiar position is further emphasized by the fact that it is under the Foreign and not the Colonial Office in Whitehall. But enough has been said for purposes of illustration.

I have now sketched rapidly the Constitutional evolution of the Colonial system, and the several categories—'Responsible Government,' 'Representative Government,' and 'Crown Colony Government'—will, I trust, possess for the student something more of substantiality and concreteness. It remains to be seen how the various over-sea possessions of the Crown fit into the Imperial Economy. The fit is in many respects exceedingly bad, and in some cases almost non-existent.

Between the over-sea Dominions and the mother-country there are five Constitutional links. (1) The King in Parliament is Sovereign not only in the United Kingdom but throughout the Empire. In theory he can legislate for the Australian Commonwealth and the Canadian Dominion,

precisely as he can for India or Gibraltar or Scotland or Wales. In practice he does legislate, to a considerable extent, to secure objects which are common to the Empire as a whole, but which are beyond the competence of any given Colonial Legislature. A long series of Acts relating to Merchant Shipping afford a good instance of this. The Imperial Parliament, again, is a constituent legislature for the Empire; the existing Constitutions of Canada, Australia, and South Africa are all based upon the Statute Law of the United Kingdom. Or again, the Imperial Parliament intervenes to validate doubtful Acts passed by Colonial Legislatures.[1] The Legislative authority of the Imperial Parliament is, therefore, a reality.

(2) The King of Great Britain and Ireland is throughout his dominions supreme. That supremacy is exercised in several ways. Of these, two are particularly important: the King may veto or disallow any Act passed by a Colonial Legislature, even though it has received the assent of his representative—the Governor; or he may instruct the Governor to interpose his veto upon legislation. This intervention naturally tends to become rarer, but between 1836 and 1864 no fewer than 341 Bills were under Royal instructions reserved for the consideration of the Crown in the North American Colonies alone, and of these 47 never received the Royal Assent.[2] The Crown is also, for all parts of the Empire, the sole fountain of Honour; all decorations and distinctions emanate from the King in the Dominions as in the mother-land. (3) The Crown still appoints all Colonial Governors. (4) Questions of Foreign Policy, and particularly questions of peace and war, are entirely under the control of the Home Government. (5) From all the over-sea Dominions, whatever their grade in the Imperial hierarchy, there lies an appeal to the Judicial Committee of

[1] See on this subject, Keith, *Responsible Government*, 176-221.

[2] Keith, *op. cit.* p. 3.

the Privy Council. This function has not passed unquestioned, but the advantages of an impartial though distant tribunal outweigh the obvious disadvantages, and though the right of appeal has been by recent legislation curtailed, and is likely to be further restricted in the future, this judicial link is not likely to be snapped so long as the Empire endures.

Such are the legal links between the United Kingdom and the sister-states. Are they adequate? On paper they seem strangely slight as foundations for so vast a structure; and if the imperial cohesion depended upon legal links alone the Empire would long since have dissolved into its constituent atoms. Happily it does not. Apart from legal unity and constitutional bonds, there is a unity of sentiment and there are bonds of self-interest. Of the sentiment which finds expression in devoted loyalty to a personal monarch I have already spoken. There are other ties of sentiment, some, but not all, of which must necessarily weaken as the years go on. The sentiment of loyalty to a common Sovereign is likely, on the contrary, to endure, and even to increase in intensity. Of the bonds of self-interest it is impossible to speak in detail, but it is obvious that, vast as are the future potentialities of the daughter-lands they would, as things are at present, lose immensely in significance were they to be separated from the parent-stock and from each other.

To take one point only. Their defence-organization is as yet wholly inadequate; in this important respect they are dependent, all but entirely, on the mother-land. It is true that the Imperial connexion may in some cases actually expose them to attack. In the event of war the Empire is a legal unit, as it has proved itself to be a unit in sentiment. The Power with which Great Britain is at war may deliver the attack in Australia, India, Canada, or a Mediterranean Station. Conversely, an attack upon New Zealand or Natal would mean war with Great Britain. The mother-

country has so far assumed all but entire responsibility for Imperial Defence. The present writer would be the last to ignore or belittle the splendid services rendered by the sister-states in the recent wars in South Africa and the Soudan, or the beginning of their contribution towards an Imperial Navy. But the fact remains that the obligation still rests mainly upon the mother-land, and that the financial burden is borne almost exclusively by the taxpayer of the United Kingdom.

Nor could it be otherwise, things being as they are. Foreign Policy is dictated from Downing Street; the Home Government is exclusively responsible for the declaration of war and the conclusion of treaties. So long as the Dominions are excluded from all participation in the direction of policy, they cannot reasonably be called upon to provide for the contingencies to which that policy may give rise.

How long the Dominions will consent to this exclusion is a moot question. A generation ago a distinguished Australian statesman[1] gave expression to the resentment felt in Australia at the absence of any 'defined position (for the Colonies) in the Imperial Economy'. The intervening years have multiplied and strengthened the grounds of complaint, even if they have not intensified the feelings of resentment. How the demand for further Constitutional recognition can be satisfied; how political sentiment can be crystallized into political institutions are problems beyond the scope of this work.[2]

One observation may be made as to the past, one prediction be hazarded as to the future. Public sentiment in England has changed with amazing rapidity during the last forty, and more particularly during the last twenty years. Disraeli's petulant outburst against 'those wretched Colonies which hang like a millstone round our neck', ought not to be

[1] Sir James Service.

[2] One proposed solution is discussed in *Second Chambers*, Chapter xii.

remembered against a statesman whose later Imperialism was above suspicion. But the sentiment which inspired it was not uncommon in the 'forties. The 'weary Titan' groaned rather heavily under the 'burden' of Empire. The predominance of the Manchester School was entirely unfavourable to Imperial sentiment. To the 'Manchester School' our 'vast and scattered dominions', as Mr. Balfour once pointed out, 'appeared to be an ill-constructed fabric built at the cost of much innocent blood and much ill-spent treasure, and which having been originally contrived in obedience to a mistaken theory of trade was not worth the trouble of keeping in repair now that that theory had been finally exploded.'[1] The ideal of Colonial policy which then prevailed is reflected with perfect accuracy by Sir George Cornewall Lewis, who in 1841 wrote in his *Essay on the Government of Dependencies*: 'If a dominant country understood the true nature of the advantages arising from the supremacy and dependence of the related communities, it would voluntarily recognize the legal independence of such of its own dependencies as were fit for independence; it would, by its political arrangements, study to prepare for independence those which were still unable to stand alone; and it would seek to promote colonization for the purpose of extending its trade rather than its empire, and without intending to maintain the dependence of its colonies beyond the time when they need its protection.'

Mr. Arthur Mills's *Colonial Constitutions*, published in 1856, was hardly less representative of the prevailing sentiment than Lewis's *Essay*. This is his deliberate conclusion: 'To ripen these communities [the Colonies] to the earliest possible maturity social, political, commercial, to qualify them by all the appliances within the reach of the parent state, for present self-government and eventual independence is now the universally admitted aim of our Colonial

[1] *Nineteenth Century*, January, 1882.

policy' So late indeed as 1872 Tennyson was impelled to repudiate the suggestion, emanating from a responsible quarter, that the Canadians should 'take up their freedom as the days of their apprenticeship were over'.

'And that true North, whereof we lately heard
A strain to shame us "Keep you to yourselves,
So loyal is too costly! Friends, your love
Is but a burthen: loose the bond and go."
Is this the tone of Empire?'

The tone of Empire it was not; but that tone had as yet hardly been heard either in our national literature or in our political life.

During the last forty years a stupendous change has taken place; the 'Imperial note has swelled louder and louder. To attempt to account for this would carry us too far; the fact will not be questioned. There are still degrees of imperial fervour, but it has been declared on high authority that 'we are all imperialists now'.

But though the strength and universality of the sentiment leave little to be desired, there is an entire lack of agreement as to the means by which sentiment should be translated into fact.

One prediction, however, may be hazarded. Things will not remain as they are. It is not according to the genius of English institutions that they should. Any prediction more precise is likely to be falsified by the event. Some look forward to the creation of an Imperial Council in which the responsible Dominions shall have a voice in those matters—notably Defence—which concern the Empire as a whole. Others entertain a larger hope, and look for the gradual evolution of some scheme of political and commercial federation. They point to the Constitutional development—in this respect uniform—of the great Dominions. They have witnessed the adoption of the federal system in Canada and Australia, and the unification of South Africa. They ask, with some reason, why the process should be

arrested at this point; whether the impulse which has brought Vancouver and Quebec, Victoria and New South Wales, the Transvaal and Natal together has spent its force; whether the statesmanship which has already solved problems so difficult may not avail for an even greater task. But the kingdom cometh not by observation. That lesson at least is taught by an historical survey of English institutions. An important change in the centre of Constitutional gravity was due in the seventeenth century; and change would have come even if Charles I had been as wise a king as Edward I, even if Laud had not attempted to thrust Arminianism down the throats of the Scotch Calvinists. Things were working towards the Cabinet system before the accession of a German Sovereign whose lack of English rendered personal government impossible, and whose indifference to English interests hatched the egg which contained a Prime Minister. The great disruption of 1783 robbed us of the flower of our first Colonial Empire. The sun of England seemed to have set amid clouds of humiliation. But the things which had been were but a prelude to the greater things to be. They came, but not by observation. It was in a fit of absence of mind, according to Seeley, that we conquered half the world. The aphorism is only partially true. Nevertheless, it is true that the English genius does not tend towards the conscious perfection of Constitutional machinery. The mistrust of elaborate organization is deep-seated. But conditions are changing rapidly. Science will not tolerate empiricism. Forethought and skill tend to circumscribe the domain of chance. Can the unorganized survive in an Armageddon conducted on scientific principles? No one who has listened to the voice of history—no one who has ears for the echoes of contemporary politics, can be deaf to such questions as these; but it does not necessarily follow that his eyes can discern the things that are to be, nor that his mind will be quick to apprehend the things that belong unto our peace.

APPENDIX

AUTHORITIES

(i) General:

A. Texts:

Dodd (ed.): *Modern Constitutions.*
Dareste: *Les Constitutions modernes.*
Demombynes: *Les Constitutions Européennes.*
Stubbs (ed.): *Charters and Documents.*
Prothero (ed.): *Statutes and Constitutional Documents.*
Gardiner (ed.): *Constitutional Documents of the Puritan Revolution.*
Robertson (ed.): *Select Cases and Documents.*

B. Critical Works and Commentaries:

Stubbs: *Constitutional History.*
Hallam: *Constitutional History.*
Erskine May: *Constitutional History.*
Maitland: *Constitutional History.*
Freeman: *Growth of the English Constitution.*
" *Historical Essays.*
Medley: *Constitutional History.*
Ridges: *Constitutional Law of England.*
Boutmy: *English Constitution.*
" *Studies in Constitutional Law.*
Hearn: *The Government of England.*
Pollock and Maitland: *History of English Law.*
Holdsworth: *History of English Law.*
Lord Halsbury (ed.): *The Laws of England.*
Anson: *Law and Custom of the Constitution.*
A. V. Dicey: *Law of the Constitution.*
Goodnow: *Comparative Administrative Law.*
Burgess: *Political Science and Comparative Constitutional Law.*
Woodrow Wilson: *The State.*
Lord Courtney of Penwith: *The Working Constitution of the United Kingdom.*
A. Lawrence Lowell: *The Government of England.*
" " *Governments and Politics in Continental Europe.*
Low: *The Governance of England.*
Bagehot: *English Constitution.*

Ostrogorski: *Democracy and the Organization of Political Parties.*
Lecky: *Democracy and Liberty.*
Maine: *Popular Government.*
Godkin: *Problems of Modern Democracy.*
Mill: *Liberty.*
„ *Representative Government.*
Bryce: *American Commonwealth.*
„ *Studies in History and Jurisprudence.*
Tocqueville: *Democracy in America.*
Henry Sidgwick: *The Development of European Polity.*

(ii) SPECIAL TOPICS:

(*a*) **Classification of Constitutions:**

Aristotle: *Politics* (ed. Newman or Jowett).
Hobbes: *Leviathan.*
Seeley: *Introduction to Political Science.*
Henry Sidgwick: *Elements of Politics.*
Bluntschli: *Theory of the State.*
Cornewall Lewis: *Use and Abuse of Political Terms.*
Montesquieu: *L'Esprit des Lois.*
Bolingbroke: *Letters on History.*

(*b*) **The Executive:**

Anson: *Law and Custom of the Constitution.* (*The Crown.*)
Dicey: *Privy Council.*
Gladstone: *Gleanings of Past Years.* I.
Traill: *Central Government.*
Blauvelt: *Development of Cabinet Government in England.*
Nicholas: *Proceedings of the Privy Council.*

Much of the information as to the relations of the Crown and the Cabinet can be found only scattered in memoirs, letters and biographies, among the crowd of which may be mentioned: Morley, *Walpole*; *Correspondence of George III and Lord North*; *Chatham Correspondence*; Walpole, *Memoirs of George III*; *Grenville Papers*; Buckingham, *Court and Cabinets of George III*; Anson, *Memoirs of the third Duke of Grafton*. Fitzmaurice, *Shelburne*; Stanhope, *Pitt*; *The Letters of Queen Victoria* (ed. Benson and Esher); Lee, *Life of Queen Victoria*; *The Croker Papers* (ed. Jennings); *The Creevey Memoirs* (ed. Maxwell); *The Greville Memoirs*; Sir T. Martin, *Life of the Prince Consort*, and *Life of Lord Lyndhurst*; *The Peel Papers* (ed. Parker); Morley, *Life of Gladstone*; Lord Rosebery, *Peel*; Torren, *Life of Melbourne*, and *Melbourne Papers* (ed. Sanders); Sir Spencer Walpole, *Life of Lord John Russell*; Lord Malmesbury, *Memoirs of an ex-Minister*; Ashley, *Life of Lord Palmerston*; Parker, *Life and Letters of Sir James*

Graham; Fitzmaurice, *Life of Earl Granville*; the Duke of Argyll, *Autobiography and Memoirs*; W. S. Churchill, *Lord Randolph Churchill*; Lang, *Sir Stafford Northcote.*

(*c*) **The Legislature:**

Todd: *Parliamentary Government in England.*
,, *Report on the Dignity of a Peer.*
Pike: *Constitutional History of the House of Lords.*
J. A. R. Marriott: *Second Chambers.*
McKechnie: *Reform of the House of Lords.*
Erskine May: *Parliamentary Practice.*
Redlich: *Parliamentary Procedure in England.*
Ilbert: *Legislative Methods and Forms.*
,, *Manual of Parliamentary Procedure.*
Clifford: *History of Private Bill Legislation.*
S. Walpole: *Electorate and Legislature.*
Lowes Dickinson: *The Development of Parliament in the Nineteenth Century.*
Porritt: *Unreformed House of Commons.*

(See also General Works, i. B.)

(*d*) **Local Government:**

Percy Ashley: *Local and Central Government.*
Redlich and Hirst: *Local Government in England.*
,, ,, *Report of Royal Commission on Local Taxation, 1899.*
Gomme: *Principles of Local Government.*
,, *Report of Local Government Board* (annual).
,, *Municipal Year Book* (annual).
Wright and Hobhouse: *Local Government and Local Taxation.*
Odgers: *Local Government.*
Jenks: *Local Government.*
Darwin: *Municipal Ownership.*
,, *Municipal Trading.*
H. R. Meyer: *Municipal Ownership in Great Britain.*
B. and S. Webb: *English Local Government.*
Shaw: *Municipal Government in Great Britain.*
Goodnow: *Municipal Problems.*
Eaton: *The Government of Municipalities.*
Munro: *The Government of European Cities* (c. iii).

(*e*) **The Judiciary:**

Dicey: *Law of the Constitution.*
Maitland: *Justice and Police.*
Carter: *History of English Legal Institutions.*
Holdsworth: *History of English Law.*

Pollock and Maitland: *History of English Law.*
Stephen: *History of Criminal Law.*
„ *The Federalist.*
Goodnow: *Comparative Administrative Law.*
Aucoc: *Conférences sur l'administration et le droit administratif.*
Blackstone: *Commentaries.*

(*f*) **The Empire:**

Lucas: *Historical Geography of the British Colonies.*
Egerton: *Origin and Growth of English Colonies.*
„ *British Colonial Policy.*
„ *Federations and Unions in the British Empire.*
Lord Durham: *Report on Canada* (ed. Lucas). *Analysis of the System of Government throughout the British Empire* (1912).
W. Macdonald: *Select Documents illustrative of the History of the United States.*
Seeley: *Expansion of England.*
E. B. Greene: *The Provincial Governor in the English Colonies of North America.*
Payne: *Colonies and Colonial Federations.*
G. Causton and A. H. Keene: *Early Chartered Companies.*
George: *Historical Geography of the British Empire.*
Hertz: *Old Colonial System.*
Adam Smith: *Wealth of Nations* (Book iv).
Todd: *Parliamentary Government in the British Colonies.*
G. C. Lewis: *Essays on the Government of Dependencies.*
Mills: *Colonial Constitutions.*
Egerton and Grant (ed.): *Evolution of Canadian Self-Government.*
Goldwin Smith: *Canada and the Canadian Question.*
Harrison Moore: *Commonwealth of Australia.*
R. H. Brand: *Union of South Africa.*
Chesney: *Indian Polity.*
Ilbert: *The Government of India.*
Hunter: *Brief History of the Indian Peoples.*
„ (ed.): *Rulers of India* (Series).
Lyall: *Growth of British Dominion in India.*
Jenkyns: *British Rule and Jurisdiction beyond the Seas*
Keith: *Responsible Government in the Dominions.*
Jebb: *Colonial Nationalism.*
Goldwin Smith: *The Empire.*
Froude: *Oceana.*
Parkin: *Imperial Federation.*
Holland: *Imperium et Libertas.*
Statesman's Year Book.
Colonial Office List.

APPENDIX

SOME RECENT BOOKS

J. A. R. Marriott: *The Mechanism of the Modern State* (Oxford University Press, 1927).

" " *Second Chambers* (Oxford University Press, 2nd edition, 1927).

" " *The Crisis of English Liberty* (Oxford University Press, 1931).

" " *Modern England* (Methuen, 1934).

" " *This Realm of England* (Blackie, 1938).

" " *The English in India* (Oxford University Press, 1932).

W. Ivor Jennings: *Cabinet Government* (Cambridge University Press, 1936).

C. S. Emden: *The People and the Constitution* (Oxford University Press, 1933).

Lord Hewart: *The New Despotism* (Benn, 1929).

R. A. Glen: *Local Government Act*, 1929 (Eyre and Spottiswoode, 1934).

F. J. Port: *Administrative Law* (Longmans, 1929).

K. C. Wheare: *The Statute of Westminster and Dominion Status* (Oxford University Press, 1938).

R. C. K. Ensor: *Courts and Judges* (Oxford University Press, 1933).

C. K. Allen: *Bureaucracy Triumphant* (Oxford University Press, 1931).

H. V. Evatt: *The King and His Dominion Governors* (Oxford University Press, 1936).

A. Berriedale Keith: *The King and the Imperial Crown* (Longmans, 1936), and other works.

Wright and Hobhouse: *Local Government and Taxation*, edited by C. Oakes (Sweet & Maxwell, 8th edition, 1937).

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